74-1245

Supreme Court, U. S.
FILED
APR 2 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-.....

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL, AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

KALVIN M. GROVE
STEVEN R. SEMLER
LEDERER, FOX AND GROVE
Sears Tower—Suite 7916
233 South Wacker Drive
Chicago, Illinois 60606

ROBERT A. PENNEY
175 Berkeley Street
Boston, Massachusetts 02226

CLEM R. KYLE
717 Liberty Avenue
Pittsburgh, Pennsylvania 15222
Attorneys for Liberty Mutual Insurance Company

Gunthorp-Warren Printing Company, Chicago • 346-1717

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
The Federal Judiciary Requires Guidance Concerning the Effect to Be Accorded This Court's Decision in *Geduldig* v. *Aiello* in the Administration of Title VII.	5
Conclusion	12
Appendices	A1

Authorities Cited

Cases

Communication Workers of America v. A.T. & T. Co., Long Lines Dept., 379 F. Supp. 679 (S.D. N.Y. 1974), appeal docketed, No. 74-2191 (2nd Cir. 1974) 10

Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) 8

Geduldig v. Aiello, 417 U.S. 484 (1974) 3, 5, 6, 7, 10, 11

Gilbert v. General Electric Company, 375 F. Supp. 367 (E.D. Va. 1974), appeal docketed, No. 74-1557 (4th Cir. 1974) 11

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 7

Harding v. Kemper Insurance Co., No. 74-E-448-S (Mass. Comm. Against Discrimination) 11

Isakson v. Fireman's Fund American Insurance Co., No. 74-67 (City of Minneapolis Dept. of Civil Rights) 11

N.L.R.B. v. Savair Mfg. Co., 470 F. 2d 305 (6th Cir. 1972), aff'd. 414 U.S. 270 (1973) 9

Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238 (N.D. Ga. 1973) 5, 9

Ohio Civil Rights Commission v. Nationwide Life Insurance Co., Case No. SE-6-74-2353 (O.C.R.C.) 11

Sale v. Waverly—Shell Rock Board of Education, ... F. Supp. ....., 9 FEP Cases 138 (N.D. Iowa 1975) 11

Udall v. Tallman, 380 U.S. 1 (1965) 9

Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N. D. Cal. 1973) 9

Willingham v. Macon Telegraph Publishing Co., 507 F. 2d 1085 (5th Cir. 1975) (*en banc*) 8

Statutes & Regulations

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1292(b) 11

42 U.S.C. § 2000e *et seq.* 2, 5

29 CFR §§ 1604.9-1604.10 2-3

Miscellaneous

Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 So. Cal. L. Rev. 965 (1973) 8

Note, *Developments in The Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109 (1971) 8

Opinion Letter of EEOC General Counsel, CCH Employment Practices, December 21, 1966, ¶ 17,304.43 (1966 ed.) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-.....

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL, AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Liberty Mutual Insurance Company (herein "Liberty" or "the Company") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on February 11, 1975. (App. p. A1).

OPINIONS BELOW

The opinion of the Court of Appeals (App. pp. A2-A18) is not yet officially reported. The opinion of the District Court (App. pp. A19-A48) is reported at 372 F. Supp. 1146 and its memorandum order, denying the Company's motion for reconsideration (App. pp. A49-A51), is reported at 372 F. Supp. 1163.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Third Circuit (App. pp. A1-A48), affirming the judgment of the United States District Court for the Western District of Pennsylvania (App. pp. 19-51), were both issued on February 11, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does an employer's exclusion of coverage for pregnancy related disabilities from an employee disability income protection plan constitute sex discrimination proscribed by Title VII of the Civil Rights Act of 1964?

STATUTE INVOLVED

The relevant portion of Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(1), is set forth below:

* * * * *

> Sec. 703. (a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

* * * * *

The relevant portions of the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 CFR, Chapter XIV, Part 1604, Sections 1604.9 and 1604.10, effective March 30, 1972, are set forth below:

* * * * *

> Sec. 1604.9 Fringe Benefits.—(a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.
>
> (b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits. * * *

* * * * *

> Sec. 1604.10 Employment Policies Relating to Pregnancy and Childbirth.—(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.
>
> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities. * * *

* * * * *

STATEMENT OF THE CASE

This case presents a significant question of first impression in the administration of the Civil Rights Act of 1964, as amended, which was raised, but not resolved, in this Court's recent decision in *Geduldig* v. *Aiello*:[1] whether a private employer's distinctions in coverage under an employee income protection plan, based upon pregnancy, constitutes sex discrimination under Title VII, particularly when, under *Aiello*, the identical exclusion by a State, under its plan, was found to not constitute discrimination based on sex.

---

1. 417 U.S. 484 (1974).

Liberty Mutual is a casualty insurance company which maintains offices throughout the country. Both men and women are employed in the claims departments of these offices in what the Company terms a "technical" capacity. Two of these technical claims department employees in Pittsburgh, Pennsylvania, filed charges with the Equal Employment Opportunity Commission in 1971 accusing Liberty of engaging in proscribed sex discrimination.[2] Upon issuance of a right to sue letter to plaintiffs, they commenced an action in the district court, alleging, insofar as is relevant herein, that Liberty discriminated against a nationwide class of all female employees working in a technical capacity in all Liberty claims offices, with respect to the exclusion of coverage for pregnancy from its employee disability income protection plan.

Liberty provides its employees with an income protection plan as a fringe benefit. Pursuant to this plan, an employee out of work eight calendar days due to an illness requiring the care of a physician, receives insurance benefits for the duration of disability, which continues for a period of up to age 65 if the employee has been with the Company for more than five years, or for a maximum two-year period if with the Company less than five years. In addition, employees receive a salary supplement for as many weeks as they have completed years of service with the Company. The plan does not cover leaves or temporary absences occasioned by pregnancy.[3]

Upon the basis of the foregoing, which was adduced by means of discovery, plaintiffs moved for summary judgment with respect to liability. The district court granted that motion on January 9, 1974 and issued an interlocutory order finding that Liberty violated the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., with respect to application of its income protection plan to pregnant employees (App. pp. 19-48). Thereafter, Liberty moved the district court to reconsider its order in light of the opinion of the United States District Court for the Northern District of Georgia in *Newmon* v. *Delta Air Lines, Inc.*, 374 F. Supp. 238 (1973). The district court denied this motion on February 20, 1974, but at the same time certified its findings as a final order (App. pp. 49-51), thus enabling Liberty's appeal to the Third Circuit, which on February 11, 1975, affirmed the district court's decision (App. pp. A2-A18).[4]

2. It is noteworthy that, at the time the charges were filed, the Company's policy of excluding coverage of pregnancy under its disability policy, was *lawful*, even in the view of the E.E.O.C. It was only subsequent to the charges that the Commission, on March 30, 1972, reversed its position and, via its guidelines, condemned the practice it previously stated was not unlawful.

3. Nor does it cover intentionally self-inflicted injuries, suicide attempts, accidents arising out of employment (for which workmen's compensation benefits would accrue), nor disabilities arising out of war.

REASONS FOR GRANTING THE WRIT

The Federal Judiciary Requires Guidance Concerning the Effect to Be Accorded This Court's Decision in Geduldig v. Aiello in the Administration of Title VII

1. In *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), this Court held that a similar exclusion of coverage for pregnancy benefits under a public disability income plan administered by the State of California did not amount to individious sex discrimination in violation of the equal protection clause of the Fourteenth Amendment to the Constitution. In finding the "under-inclusiveness of the set of risks that the State has selected to insure"[5] to be nondiscriminatory, this Court observed that the plan neither "discriminated[d] with respect to the persons or groups which are eligible for disability insurance protection under

4. The Court of Appeals also affirmed the finding that the Company violated Title VII by requiring pregnant employees to return to work within six months of the commencement of leave, or three months from delivery. The Petitioner does not present that question for review by this Court.

5. 417 U.S. at 494.

the program,"[6] nor "worked to discriminate against any definable group or class in terms of the aggregate risk protection derived . . ."[7]. As the Court succinctly summarized, the predicate for a finding of discriminatory treatment was plainly lacking: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."[8]

Notwithstanding the presence of the identical factors in the subject case which this Court utilized in *Aiello* to explain the nondiscriminatory nature of the pregnancy exclusion therein, the Court of Appeals summarily dismissed *Aiello's* applicability, finding it "not dispositive," because that case arose in a constitutional, rather than statutory, context (App. p. A8). It is submitted, however, that *Aiello is* dispositive and that the source of the Court of Appeals error lie in its misconception of this Court's analysis in *Aiello*.

The equal protection context involved in *Aiello* posed a two step analytical framework: *First*, was there discrimination on the basis of sex? *Second*, if so, was it defensable on the grounds that rationale reasons supported it. While the second step of analysis may conceivably yield different results in the statutory context due to Title VII arising under the commerce, rather than equal protection clause, the first question is the *same* in either the constitutional or statutory context. Since this Court decided in *Aiello* that the pregnancy exclusion was not discriminatory, that holding, forming the initial, as well as dispositive step of analysis, disposed of this case. The distinctions drawn by the Court of Appeals on the basis of the rational State interests pertinent to the second step of analysis are wholly irrelevant and, accordingly, an erroneous basis for distinguishing *Aiello*.

6. *Id.*

7. *Id.* at 496.

8. *Id.* at 496-97 (footnote omitted).

The subject decision of the Court of Appeals therefore conflicts with this Court's decision in *Aiello* and mandates review by this Court to provide guidance to the federal judiciary concerning the relationship of that case to the administration of Title VII.

2. The Court of Appeals justified its decision primarily upon deference to the E.E.O.C.'s self-serving sex discrimination guidelines which require insurance coverage for pregnancy when coverage for most other disabilities is provided (App. p. A12). The guideline is, however, untenable, and the power wielded by the Commission thereunder constitutes a particularly pernicious abuse of agency power which commands review by this Court.

a. The dissenting Justices in *Aiello* relied heavily upon the Commission's sex discrimination guidelines (pp. 2-3, *supra;* 417 U.S. at 501). In express response to the dissent, the majority rejected that argument, explaining (*Id.* at 496 n. 20):

> * * * Normal pregnancy is an objectively identifiable physical condition with unique characteristics. * * *
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

The rationale of *Aiello's* footnote no. 20 is equally applicable to this case and compels rejection of the Commission's fundamentally inconsistent sex discrimination guidelines.

b. It is axiomatic that agency guidelines which are founded upon supportive legislative history are entitled to great deference[9] by the judiciary, and conversely, those which are con-

9. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433 (1971).

trary to the legislative history are entitled to no deference.[10] Here, however, there is *no* legislative history[11] supporting the Commission's guideline.[12]

Indeed, the Commission, for the first eight years in the administration of the Act uniformly maintained that the practice it now condemns was *not* unlawful. Thus, the Commission maintained:

> [I]t is our opinion that . . . a company's group insurance program which . . . excludes from its long term salary continuation program those disabilities which result from pregnancy and childbirth would not be in violation of Title VII.[13]

10. *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973).

11. The "sex" discrimination amendment to Section 703(a) was passed only one day before the House approved Title VII. There was, as a result, only cursory floor debate; indeed, even the Court of Appeals observed that it was inserted in a "tongue-in-cheek manner with the intent to undermine the entire Act and assist in its defeat." (App. p. A9) Commentators have reached the same conclusion as well. See, e.g., Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 So. Cal. L. Rev. 965, 968 (1973); Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1167 (1971).

12. The absence of any meaningful legislative history concerning the scope of the congressional ban against sex discrimination has, moreover, engendered a significant conflict in the Court of Appeals over the breadth of this proscription. Thus, the Court of Appeals concluded herein, notwithstanding its concession that pertinent legislative history was "indeed meager," that "the broad purposes of the Act can be applied to sex discrimination cases. Congress intended to strike at all discriminatory treatment of men and women." (App. p. A9) In contrast, however, the Fifth Circuit held in *Willingham* v. *Macon Telegraph Publishing Co.*, 507 F.2d 1085, 1090 (*en banc*, 1975), that the inconclusive legislative history compelled the "negative inference" that "[C]ongress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications." This conflict, it is submitted, threatens uniform administration of Title VII and hence, further mandates review by this Court.

13. This position statement of the Commission's General Counsel was nationally reported in CCH Employment Practices, December 21, 1966, 17,304.43 (1966 ed.).

Notwithstanding the absence of any articulated basis for change, the Commission then suddenly reversed itself, and after the charges in this case were filed, promulgated the rule that "benefits shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities" (p. 3, *supra*). By giving great deference to the Agency's new guideline, the Court has ignored and corrupted the premises upon which deference is owed.

First, deference accorded an agency's interpretation is sound only to the extent that it "has been acted upon for a number of years" and is consistent with legislative history. *Udall* v. *Tallman*, 380 U.S. 1, 18 (1965). Neither requirement is met in this case. In such circumstances, the original view is traditionally deemed the correct one,[14] especially since there was no foundation for change from the longstanding prior position which, moreover, Congress made no attempt to modify when Title VII was amended in 1972.[15]

Second, the Commission's guidelines are not reasonable in fact; they equate pregnancy with illness for purposes of requiring coverage for it on a same par with other temporary disabilities occasioned by illness. Indeed, as one federal court recently critically observed in refusing to give any deference to the same guideline here involved, "there appears to be no factual basis upon which these regulations were drawn."[16] Further, there is simply no evidence that the Commission gave serious thought to the widespread ramifications[17] of its sudden reversal in policy.

14. Cf. *N.L.R.B.* v. *Savair Mfg. Co.*, 470 F.2d 305 (6th Cir. 1972), *aff'd*, 414 U.S. 270 (1973).

15. Cf. *Van Hoomissen* v. *Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal. 1973).

16. *Newmon* v. *Delta Air Lines, Inc.*, 374 F. Supp. 238, 245 (N.D. Ga. 1973).

17. American Telephone and Telegraph Company, *amicus curiae* in the Court of Appeals, estimates, for example, that based on an eight week leave, system wide benefit costs for the projected number of pregnancies would have increased its costs by $19,037,330 for 1971-1972.

Third, and perhaps the most pernicious aspect involved, the agency has worked a reversal of the burden of proof upon litigants: Under the shield of "agency deference", the Commission has evaded the scrutiny required of its reversed position, and the Court of Appeals' (App. p. A12) acquiesence has catapulted the guideline, from the shallow sands upon which it is built, into a fortress-like rule of law which exists simply because the Commission says it does. By baselessly changing its position and then bootstrapping its position on the ground that its views are entitled to great deference, the Agency has insulated itself from challenge and avoided its burden of proof. Such abusive exploitation of the rule of deference to agency guidelines, it is submitted, has engendered lack of respect in the business community for the Commission's view and, accordingly, warrants review by this Court to end the increasing litigation generated by the widespread refusal to acquiese in the Commission's newly divined rule.

3. The uncertain status concerning the effect to be given *Aiello* in the Title VII context has already produced a significant conflict in the federal courts, which is only serving to engender further litigation as employers and fair employment practice agencies square-off awaiting further guidance from this Court. Thus, in direct conflict with the subject decision the district court for the Southern District of New York found *Aiello* dispositive in a Title VII case similar to the subject one: In *Communications Workers of America* v. *A. T. & T. Co., Long Lines Dept.*, 379 F. Supp. 679, 682 (S.D.N.Y.), the Court, relying exclusively upon *Aiello,* and dismissing the case, stated:

> The holding [in *Aiello*] was that California's treatment of pregnancy related disabilities did not in and of itself constitute a discrimination based on sex (or gender). Such a

> holding precludes relief under Title VII even more clearly than under the Fourteenth Amendment. Under the Amendment it would be open to pregnant women to argue that it was irrational to single them out as a class even if the singling out were not sex related. No such argument is open under Title VII. . . .

That judgment has been appealed to the Court of Appeals for the Second Circuit,[18] where it has been argued and is awaiting decision. In contrast, the district court in *Sale* v. *Waverly-Shell Rock Board of Education,* ..... F. Supp. ....., 9 FEP Cases 138, 141 (N.D. Iowa 1975), refusing to apply *Aiello* and finding a violation, certified the case for immediate appeal pursuant to 28 U.S.C. § 1292(b), because of its assessment that "this order involves a controlling question of law as to which there is a substantial ground for difference of opinion." Additionally, an appeal involving the effect of *Aiello* in the Title VII context is pending in the Court of Appeals for the Fourth Circuit.[19] Because of the volume of litigation generated as a result of the *Aiello* decision, and the likelihood of additional cases crowding the judicial and agency dockets,[20] this Court should clarify the meaning of that case and its relationship to Title VII.

---

18. No. 74-2191, Court of Appeals for the Second Circuit.

[While this Petition was in the final stages of printing, counsel was telephonically advised that the Court of Appeals had just reversed and remanded the *A.T.&T.* case. While this reversal further demonstrates the conflict within the judiciary concerning the effect of *Aiello,* our analysis of the Second Circuit's decision must, of necessity, be reserved to our reply to the anticipated opposition to this Petition.]

19. *Gilbert* v. *General Electric Company,* Fourth Circuit, No. 74-1557, on appeal from the U.S. District Court for the Eastern District of Virginia, 375 F. Supp. 697 (1974).

20. E.g., *Isakson* v. *Fireman's Fund American Insurance Co.,* No. 74-67, (City of Minneapolis Dept. of Civil Rights), *Ohio Civil Rights Commission* v. *Nationwide Life Insurance Co.,* Case No. SE-6-74-2353 (O.C.R.C.); *Harding* v. *Kemper Insurance Co.,* No. 74-E-448-S (Massachusetts Comm. Against Discrimination).

CONCLUSION

For the foregoing reasons, Liberty Mutual Insurance Company respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

KALVIN M. GROVE
STEVEN R. SEMLER
LEDERER, FOX AND GROVE
Sears Tower—Suite 7916
233 South Wacker Drive
Chicago, Illinois 60606

ROBERT A. PENNEY
175 Berkeley Street
Boston, Massachusetts 02226

CLEM R. KYLE
717 Liberty Avenue
Pittsburgh, Pennsylvania 15222
Attorneys for Liberty Mutual Insurance Company

Appendices

UNITED STATES COURT OF APPEALS
for the Third Circuit

No. 74-1233

SANDRA WETZEL and MARI ROSS, on behalf of themselves and all others similarly situated,

Equal Opportunity Commission as Amicus Curiae,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a corporation,
Appellant.

(D. C. Civil Action No. 72-169)

On Appeal from the United States District Court
for the Western District of Pennsylvania

Present: STALEY, HASTIE and ALDISERT, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed February 20, 1974, be, and the same is hereby affirmed. Costs taxed against appellant.

Attest:

/s/ T. F. QUINN,
Clerk

February 11, 1975

UNITED STATES COURT OF APPEALS
for the Third Circuit

No. 74-1233

SANDRA WETZEL, and MARI ROSS, on behalf of themselves and all others similarly situated,

vs.

LIBERTY MUTUAL INSURANCE COMPANY,
a Corporation,
Appellant.

On Appeal from the United States District Court for the Western District of Pennsylvania

---

Argued October 30, 1974

Before STALEY, HASTIE and ALDISERT, *Circuit Judges.*

KALVIN M. GROVE,
STEVEN R. SEMLER,
LEDERER, FOX AND GROVE,
Sears Tower—Suite 7916,
233 South Wacker Drive,
Chicago, Illinois 60606.

ROBERT A. PENNEY,
175 Berkeley Street,
Boston, Massachusetts 02226.

CLEM R. KYLE,
717 Liberty Avenue,
Pittsburgh, Pennsylvania 15222.
Attorneys for Appellant.

HOWARD A. SPECTER,
EDWARD C. SMITH,
LITMAN LITMAN HARRIS & SPECTER, P. A.,
1320 Grant Building,
Pittsburgh, Pennsylvania 15219.

ROBERT F. STONE,
FINE, PERLOW AND STONE,
1528 Frick Building,
Pittsburgh, Pennsylvania 15219.
Attorneys for Appellees.

JOHN G. WAYMAN,
SCOTT F. ZIMMERMAN,
WALTER P. DEFOREST III,
MARTHA HARTLE MUNSCH,
REED SMITH SHAW & McCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219,
Counsel for Amicus Curiae Westinghouse Electric Corporation.

WILLIAM A. CAREY, *General Counsel,*
JOSEPH T. EDDINS, *Associate General Counsel,*

BEATRICE ROSENBERG,
CHARLES L. REISCHEL,
BETH L. DON,
Attorneys for Amicus Curiae Equal Employment Opportunity Commission,
1800 G Street, N. W.,
Washington, D. C. 20506.

OPINION OF THE COURT.

(Filed February 11, 1975)

By STALEY, *Circuit Judge*.

This appeal presents this court with significant questions of first impression. We are asked to determine whether Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e, et seq.,[1] is violated by a private employer who maintains employment policies that exclude pregnancy benefits from the company's income protection plan and that require female employees to return to work within three months after childbirth or face termination.

Appellant, Liberty Mutual Insurance Company ("Liberty Mutual") is a national insurance underwriting business. Two of its employees, Wetzel and Ross, filed charges of sex discrimination with the Pennsylvania Human Relations Commission ("PHRC"). Filing of these charges led the company to review and change certain employment policies. The PHRC, however, failed to conciliate the parties, and Wetzel and Ross then filed charges with the United States Equal Employment Opportunity Commission ("EEOC"). After the statutory period within which charging parties are precluded from commencing litigation, Wetzel and Ross requested and received right-to-sue letters. On February 28, 1972, appellees commenced a class action on behalf of female employees of Liberty Mutual, alleging that appellant's hiring and promotion policies and its pregnancy related policies violated Title VII. The court granted the plaintiffs' motion for class action and ordered that the suit could be maintained as a class action under Rule 23(b)(2) of the Fed.

1. Section 703(a)(1) of the Civil Rights of 1964, 42 U. S. C. § 2000e2(a)(1), in pertinent part provides:

> "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discrimnate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *."

R. Civ. P. On March 26, 1973, after extensive discovery, Wetzel and Ross moved for partial summary judgment only as to the issue of liability. The district court, on January 9, 1974, finding no issues of material fact, entered an interlocutory order finding that Liberty Mutual's pregnancy-related policies violated Title VII of the Civil Rights Act of 1964. Liberty Mutual subsequently filed a motion for reconsideration which was denied by the court. On February 20, 1974, the district court, pursuant to Rule 54(b), directed the entry of final judgment as to the pregnancy-related issues,[2] thus giving this court jurisdiction under 28 U. S. C. § 1291. It is from this order that Liberty Mutual appeals. The district court, in its order of January 9, 1974, also ruled that Liberty Mutual's hiring and promotion policies violated Title VII. On March 19, 1974, that court made its judgment final, and the company appealed at No. 74-1515. That appeal has been disposed of by another panel of this court, and we need not discuss the issues presented there.[3]

Although appellant relegated the issue to a mere footnote, we believe the question of whether the district court had jurisdiction is worthy of discussion. One who alleges a violation of Title VII may not sue in federal district court until he has exhausted his administrative remedies.[4] The filing of a charge with the EEOC is a statutory prerequisite to commencing an action in federal court. Richardson v. Miller, 446 F. 2d 1247, 1248 (C. A. 3 1971).

Appellant contends that the portion of the complaint relating to the pregnancy policies should have been dismissed because those claims were not presented to the EEOC. The basis for this contention is that a box labeled "Benefits" on the Notice of Charge form was not checked. Instead, a box labeled "Terms and Conditions" was checked. We find no merit in appellant's

2. The district court's opinion is reported at 372 F. Supp. 1146 (W. D. Pa. 1974).

3. Wetzel et al. v. Liberty Mutual Ins. Co., No. 74-1515 (C. A. 3, 1975).

4. 42 U. S. C. § 2000e-5(e).

contention. The private litigant plays an important role in the enforcement of Title VII. The EEOC was created by Congress to effectuate the goals of the Civil Rights Act of 1964 ("Act"). In 1972 the Equal Employment Opportunity Act, 42 USC § 2000e-5, provided the Commission with further authority to bring its own actions. However, the Act did not provide the Commission with direct powers of enforcement. Since enforcement lies exclusively in the federal courts, Choate v. Caterpillar Tractor Co., 402 F. 2d 357, 359 (C. A. 7 1968), the rights of a private party, therefore, must not be barred by procedural technicalities if Title VII is to operate effectively. Alexander v. Gardner-Denver Co., 415 U. S. 36, 44 (1974). Courts have continously construed Title VII so as not to allow procedural technicalities to bar a claim under the Act. Sanchez v. Standard Brands, Inc., 431 F. 2d 455 (C. A. 5 1970). The only jurisdictional prerequisites that must be satisfied to commence federal action are a timely filing of charges with the EEOC and the receiving and acting on the EEOC notice of the right to sue. 42 U. S. C. § 2000e-5(e).

Under the Act the charge of discrimination must be initiated by laymen—people who are apt to be of varying educational backgrounds and certainly few, if any, having knowledge of the subtleties of pleading and of statutory distinctions. Further, the complainants are probably, at this point, not represented by counsel and should not be held to as strict a standard as appellants have suggested. Since Wetzel and Ross have satisfied the jurisdictional prerequisites and are people without legal expertise, we believe that to deny them access to the federal courts because of a technical error would seriously undermine the policies of the Act and serve only to harm the interests of those whom the Act was designed to protect. "[T]echnicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." Love v. Pullman Co., 404 U. S. 522, 527 (1972).

Also persuasive is the Supreme Court's decision in McDonnell Douglas Corp. v. Green, 411 U. S. 792, 798 (1973). The Court held that since court actions under Title VII are *de novo* a complainant is not restricted to "those charges as to which the Commission has made findings of reasonable cause." See also Fekete v. U. S. Steel Corp., 424 F. 2d 331 (C. A. 3, 1970); Robinson v. Lorillard Corp., 444 F. 2d 791 (C. A. 4, 1971).

We, therefore, believe that the district court properly had jurisdiction.

Pregnancy Benefits.

Liberty Mutual provides its employees with an income protection plan. The plan is a fringe benefit and provides employees with the payment of income during periods of disability. Funding of the plan is partially through employee contributions. After an employee is out of work eight days because of an illness requiring the care of a doctor, the employee receives a percentage of his salary for the duration of his leave. If the employee has been with the company five years or more, he receives benefits up to age 65. If the employee has been with the company less than five years, he receives the benefits for 103 weeks. Liberty Mutual, however, does not pay any benefits under the income protection plan for disability due to pregnancy or for any disability related to pregnancy. Leaves or temporary absences due to pregnancy-related disabilities are not covered by the plan.

Liberty Mutual maintains that Title VII does not require it to include pregnancy benefits in the income protection plan. In its reply brief and at oral argument, Liberty Mutual primarily relied on Geduldig v. Aiello, 417 U. S. 484 (1974). Appellant feels that Aiello is dispositive of the case before us. We believe there are several distinctions between the cases and therefore disagree with the appellant.

Geduldig v. Aiello involved the question of whether there was sex discrimination in violation of the Equal Protection Clause

of the Fourteenth Amendment. Here we are involved with the question of whether there was discrimination in violation of Title VII of the Civil Rights Act of 1964. In this posture our case is one of statutory interpretation rather than one of constitutional analysis. On this distinction alone we believe appellant's reliance on Aiello is misplaced.

In Geduldig v. Aiello, the Supreme Court held that the State of California could choose not to include disabilities relating to normal pregnancy within its disability insurance program and not be violative of the Fourteenth Amendment's prohibition against sex discrimination. The Court relied heavily on the fact that California's program was totally self-supporting, "never drawing on general state revenues." Geduldig v. Aiello, supra at 492. We are not faced with an insurance program similar to Aiello's, and we need not attempt to balance public social welfare interests with the Constitution. An examination of California's program showed that only *normal* pregnancy and delivery disabilities were excluded from the benefits, while Liberty Mutual excluded *all* pregnancy-related disabilities. It is worthy of note that at oral argument, appellants counsel declared that the company's income protection plan would not cover a disability suffered by a pregnant women but would have covered the disability had the woman not been pregnant. The California program as of January 1, 1974, covers certain pregnancy-related disabilities. See Geduldig v. Aiello, 417 U. S. 484, 490-91, note 15.

For the above reasons we do not rely on Geduldig v. Aiello and find that it is not dispositive of the issues presently before us.

We then will proceed with our analysis, first examining the legislative history of the statute involved. The Civil Rights Act of 1964 was enacted to assure equality of employment opportunities. McDonnell Douglas Corp. v. Green, 411 U. S. 792; Griggs v. Duke Power, 401 U. S. 424 (1971). Reading the statute and the legislative history of the Act indicates that

one of the goals of Congress was to provide the opportunity for anyone to enter the job market without being subjected to disparate treatment because of race, color, religion, sex, or national origin. "The purpose of this title is to eliminate, through utilization of formal and informal remedial procedures, discrimination in employment." H. Rep. No. 914, 1964, U. S. Code Cong. & Adm. News 1964, p. 2401. Congress intended to eliminate any artificial or arbitrary impediments to employment. Until the 1964 Civil Rights Act, women had little or no legal weapons to attack their systematic exclusion from many employment opportunities. The legislative history pertaining to the addition of the word "sex" to the Act is indeed meager. It appears that the amendment to the Act was offered in a tongue-in-cheek manner with the intent to undermine the entire Act and assist in its defeat. See 110 Cong. Rec. 2804-05 (1964).

In 1972 Congress had the chance to make any changes to the Act that it felt was necessary. No substantive changes were made regarding sex discrimination, and we feel this indicates a congressional satisfaction with the operation and administration of the Act. We, therefore, believe that the broad purposes of the Act can be applied to sex discrimination cases. Congress intended to strike at all discriminatory treatment of men and women. Sprogis v. United Air Lines, Inc., 444 F. 2d 1194, 1198 (C. A. 7 1971), cert. denied, 404 U. S. 991 (1971).

To effectuate the goals of Title VII, Congress created the EEOC. 42 U. S. C. § 2000e-4. As an agency, the EEOC was given the power by Congress to issue regulations or guidelines that would indicate what are or are not proscribed discriminatory practices. These guidelines are the agency's interpretation of the statute. When faced with statutory construction problems, courts have generally held that the guidelines are entitled to great deference. McDonnell Douglas Corp. v. Green, supra; Griggs v. Duke Power Co., supra.

The guidelines[5] we deal with here prohibit an employer from discriminating between men and women with regard to employment policies and fringe benefits.

Appellate urges us to reject these guidelines on the basis that the guidelines were contra to the EEOC's earlier position and are now wholly inconsistent with the policy and understanding of

5. "§ 1604.9 Fringe benefits.

"(a) 'Fringe benefits,' as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

"(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

* * *

"(d) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

* * *

"1604.10 Employment policies relating to pregnancy and childbirth

* * *

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, and availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

"(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."

the statute and therefore should be given no deference by this court. Appellant cites us Espinoza v. Farah Mfg. Co., 414 U. S. 86 (1973) in support of the argument. In that case the petitioner alleged that Farah had discriminated against her because of her "national origin" in violation of Title VII. The Supreme Court in Espinoza said the EEOC guideline then in question,

> "[T]he guideline relied on . . . is no doubt entitled to great deference, [citing cases] but that deference must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question." Espinoza supra at 94.

The Court was persuaded not to follow the EEOC interpretation of "national origin" because of legislative action by Congress. The "obvious congressional intent" was found in other statutes that required federal employees to be citizens of the United States. The Court concluded that Congress did not intend that citizenship be a requirement for federal employment and "at the same time, prevent private employers from doing likewise." Espinoza supra at 91. The EEOC guideline was, therefore, rejected. Appellant suggests that because the EEOC had for several years indicated that the denial of pregnancy benefits did not violate the Act and now holds that this practice does violate the Act, the EEOC is inconsistent, making the guidelines not worthy of our consideration. The inconsistency to which the Supreme Court addressed itself in Espinoza was that the EEOC guideline was not reflective of the congressional intent. The Court did say it was significant that the EEOC had held two different views, but went on to say that the more recent guideline was entitled to great deference. Espinoza supra at 94. Unlike Espinoza, we have not found any congressional intent contrary to the EEOC guideline nor any "compelling indications" that it is wrong. Appellant has not shown any evidence in light of the legislative history that would indicate that the guidelines are inconsistent with any congressional intent. A study of the legis-

lative history of the Act does not show any intent other than to strike at the broad spectrum of discrimination.

We are not persuaded by appellant's argument that because the guidelines in question were issued in 1972, they should not be given our deference. The EEOC as the agency charged with the responsibility of administering the Act, has issued the guidelines to keep pace with changes in society's attitudes. This evolutionary process is a necessary function of our legal system—a system that must remain flexible and adaptable to ever-changing concepts of our society. Congress has recognized this intrinsic process. See S. Rep. No. 92-415, 92d Cong., 1st Sess., p. 5, comments by Sen. Williams.

We feel that the legislative purpose of the Act is furthered by the EEOC guidelines and that the guidelines are consistent with the plain meaning of the statute. Mindful that the guidelines are interpretive rules, we will give them our deference as required by Griggs v. Duke Power Co., supra.

Under the pertinent guidelines, it is discriminatory to treat pregnancy differently from other temporary disabilities. 29 C. F. R. § 1604.10(b). Liberty Mutual expressly excludes all pregnancy disabilities from coverage under its plan while at the same time covers all other disabilities except those voluntarily inflicted.

Appellant, in justification of this policy, argues that because pregnancy is voluntary and illnesses are not, pregnancy can be excluded from its income protection plan. We disagree. Voluntariness is no basis to justify disparate treatment of pregnancy. There are a great many activities that people participate in that involve a recognized risk. Most people undertake these activities with full knowledge of the potential harm. Drinking intoxicating beverages, smoking, skiing, handball and tennis are all types of activities in which one could sustain harm.

According to the Liberty Mutual's policy, all disabilities that could result from the above activities are covered under the

income protection plan. Even if we were to accept appellant's argument of voluntariness, we find that some voluntary disabilities are covered while one voluntary disability that is pecular to women is not so covered. Either way we find no support for appellant's argument. Moreover, pregnancy itself may not be voluntary. Religious convictions and methods of contraception may play a part in determining the voluntary nature of a pregnancy. There is no 100% sure method of contraception, short of surgery, and for health reasons many women cannot use the pill. This court will not accept "voluntariness" as a reasonable basis for excluding pregnancy from appellant's income protection plan.

Appellant next contends that the plan covers only those disabilities arising from sickness, and since pregnancy is not a sickness it is properly excluded from coverage. Again we disagree. We believe that pregnancy should be treated as any other temporary disability. Employers offer disability insurance plans to their employees to alleviate the economic burdens caused by the loss of income and the incurrence of medical expenses that arise from the inability to work. A woman, disabled by pregnancy, has much in common with a person disabled by a temporary illness. They both suffer a loss of income because of absence from work; they both incur medical expenses; and the pregnant woman will probably have hospitalization expenses while the other person may have none, choosing to convalesce at home.[6]

Thus, pregnancy is no different than any other temporary disability under an income protection plan offered to help employees through the financially difficult times caused by illness.

Under Liberty Mutual's plan nearly all disabilities are covered. We believe that an income protection plan that covers so many temporary disabilities but excludes pregnancy because it is not a sickness discriminates against women and cannot stand.

---

6. See the proposal by Citizens' Advisory Council on the Status of Women, Love's Labors Lost: New Conceptions of Maternity Leaves. 7 Harv. Civ. Rights—Civ. Lib. L. Rev. 260, 282 (1972).

Appellant also contends that the plan does not violate Title VII because of the company's legitimate interest in maintaining the financial integrity of the plan.

Appellant has offered no statistical information from which we could conclude that the increased cost for pregnancy benefits would be "devastating." we do realize that there would be an increased premium. However, we are not convinced that integrity of the plan would be jeopardized.

Giving our deference to the EEOC guidelines, we agree that cost is no defense under Title VII to this particular issue. 29 C. F. R. § 1604.9(e).

Appellant advanced several other arguments to support its contentions, but we find them wholly without merit. The company's policy is neutral on its face but treats a protected class of persons in a disparate manner. This is precisely what Title VII intends to strike down. Griggs v. Duke Power Co., 401 U. S. 424.

We conclude that Liberty Mutual's income protection plan violates Title VII of the 1964 Civil Rights Act by excluding pregnancy benefits from coverage while including other kinds of temporary disabilities.

Maternity Leave.

Prior to September 1970, appellant's female employees who became pregnant were terminated after the eighth month with no right to re-employment. This policy was modified in September 1970 and again in November 1971 to allow a pregnant woman "to work for as long as her physician certifies her ability to work." This is presently the company's policy. It further allows a woman who has been employed by the company for one year to take a maternity leave of absence of six months from when the leave commences, or three months from the date of delivery, whichever comes first. The employee must return to work by or within the time limit or lose her job. This

time limitation is applied only to maternity leaves and not to any other leave of absence for other temporary disabilities. In essence, this means a person who suffered from a temporary disability other than pregnancy would return to work after recovery; however, a woman with pregnancy related disabilities must return to work within the specified time limit or be fired.

As we did in our ananlysis of pregnancy benefits and for the same reasons, we allow great deference to the EEOC guidelines. Also in keeping with our prior analysis we will view the company's leave policies, keeping in mind that pregnancy is to be treated as any other temporary disability.

The EEOC guidelines concerning the leave issue are in pertinent part as follows:

> "* * * * [E]mployment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits * * * shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 C. F. R. § 1604.10(b).
>
> "Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity." 29 C. F. R. § 1604.10(c).

The guidelines also provide that it is a violation of title VII for an employer to discriminate between men and women with regard to "fringe benefits," of which leaves are one. 29 C. F. R. § 1604.9(a) & (b). It would appear, under the EEOC's interpretation, that Liberty Mutual's maternity leave policy violates Title VII. Pregnancy, as a temporary disability, must be treated no differently than any other disability. We are not requiring appellant to give to women any more than it already gives to men. Since appellant provides leaves for all temporary disabili-

ties, it must also provide leaves for pregnancy on the same basis.

In cases that have dealt with Title VII, courts have held that any policy that operates to totally exclude women is violative of the Act. Willingham v. Macon Telegraph Pub. Co., 482, F. 2d 535 (C. A. 5 1973); Sprogis v. United Air Lines, Inc., 444 F. 2d 1194; Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228 (C. A. 5 1969). In essence Liberty Mutual has two leave policies—one for pregnancy and one for other temporary disabilities. Since pregnancy is a disability common only to women, to treat it differently by applying a separate leave policy is sex discrimination. Liberty Mutual argues that since most women are recovered within six weeks and that most women do not return to work after childbirth, the company is justified in maintaining the present maternity leave policy. We disagree. This attitude is precisely what Congress intended to strike down. Discrimination based on stereotypes or overly categorized distinctions between men and women forbidden by Title VII. Bowe v. Colgate-Palmolive Co., 416 F. 2d 711 (C. A. 7 1969); Weeks v. Southern Bell Tel. & Tel. Co., supra. Justice Marshall, concurring in Phillips V. Martin Marietta Corp., 400 U. S. 542, 545 (1971), recognized that Congress intended to prevent employers from relying on stereotyped characterizations in the formulation of their employment policies. The legal standard articulated by the EEOC requires that women be considered on an individual basis on their own particular capabilities and not on "characteristics generally attributed to the group." 29 C. F. R. § 1604.2(a)(1)(ii). A policy, therefore, that is founded on generalizations, such as most women after giving birth are fully recovered within six weeks, or that most women do not return to work after giving birth, is discriminatory because it makes no provision for considering individual capabilities. Appellant's maternity leave policy, requiring all women to return to work within three months or be fired, penalizes

women because of a physiological condition found only in their sex. There is no leeway under this leave policy to ascertain individual capabilities or characteristics. As the district court properly found, Liberty Mutual's policy bears "no relation to the fitness of any individual female to perform the functions of her job." 372 F. Supp. at 1161. One women may be physically and mentally prepared to return to her job within the arbitrary time limit, while another, although wishing to return, may be unable to do so because she has not fully recovered. We believe that a leave policy that in essence operates as two distinct policies, one affecting only women, cannot stand under Title VII. A maternity leave policy that is applied to one sex only, that is based on class generalizations of that sex, and that treats pregnancy different from other temporary disabilities, is not permitted under Title VII. The district court, therefore, properly concluded, as a matter of law, that Liberty Mutual's maternity leave policy is violative of § 703 of Title VII.

Appellant, Liberty Mutual, did not assert at trial or on its motion for reconsideration any affirmative defense, nor did it allege any evidentiary facts that could arguably give rise to a defense.[7] And even now, appellant's briefs merely allude to the possibility of a defense, never presenting to this court any substantive arguments that have been developed from the cases that have discussed this issue. There are a number of cases that consider the business-necessity defense, but Liberty Mutual has not cited any of them in relation to its justification argument. The district court, however, did address itself to the possibility of a bona fide occupational qualification, 372 F. Supp. at 1161. The court, relying on Weeks v. Southern Bell Tel. & Tel. Co., supra, and Rosenfeld v. Southern Pacific Co., 444 F. 2d 1219 (C. A. 9 1971), concluded that Liberty Mutual did not meet its burden of proof because it did not present any evidence that could raise that defense.

7. On Liberty Mutual's motion for reconsideration, the district court noted that the company did not set for any evidence in support of its argument. 372 F. Supp. at 1164.

It is only now, on appeal, that appellant attempts to justify its discriminatory policies. It is clear that an issue not raised at the trial and then presented for the first time on the appeal will not be considered by this court. A party who fails to plead or fails to produce evidence that raises certain issues is "precluded from raising such issues on appeal." Cady v. Twin Rivers Towing Co., 486 F. 2d 1335, 1337 (C. A. 3 1973); Bogacki v. American Machine & Foundry Co., 417 F. 2d 400, 407 (C. A. 3, 1969); Crompton-Richmond Co.-Factors v. Smith, 392 F. 2d 577 (C. A. 3 1967).

We conclude that Liberty Mutual's income protection plan and maternity leave policy are violative of Title VII of the 1964 Civil Rights Act. The district court properly granted summary judgment.

For the foregoing reasons, the judgment of the district court will be affirmed.

UNITED STATES DISTRICT COURT

W. D. Pennsylvania

SANDRA WETZEL and MARI ROSS on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a corporation,

Defendant.

Civ. A. No. 72-169

Jan. 9, 1974

OPINION

WEBER, *District Judge*

The two named Plaintiffs on behalf of themselves and all other female technical employees employed in Defendant Liberty Mutual Insurance Company's Claims Department (the Company) have filed a Complaint charging that the Company discriminated against women in hiring, job classification, promotions, and in the compensation and job benefits they received for the jobs they were allowed to hold.

The Representative Plaintiffs are Sandra Wetzel, a woman, who was hired by Defendant Company as a "Claims Representative" in July 1967, and Mari Ross, who was hired by Defendant Company as a "Claims Representative" in September 1967. Both allege that they suffered discrimination by reason of their

sex because of the hiring, job classification, pay differential, and employment benefit policies of Defendant Company and that these policies were applied to all female technical employees in the Defendant's Claims Department throughout the nation where Defendant Company did business.

The court determined that the action should proceed as a class action covering all female technical employees in the Defendant's Claims Department in the entire geographical area where the Company did business. The class as now defined includes all such employees who were hired or working for the Company in its Claims Department since July 2, 1965, the effective date of Title VII of 42 U. S. C. § 2000e et seq., the Equal Employment Opportunity Act of 1972.

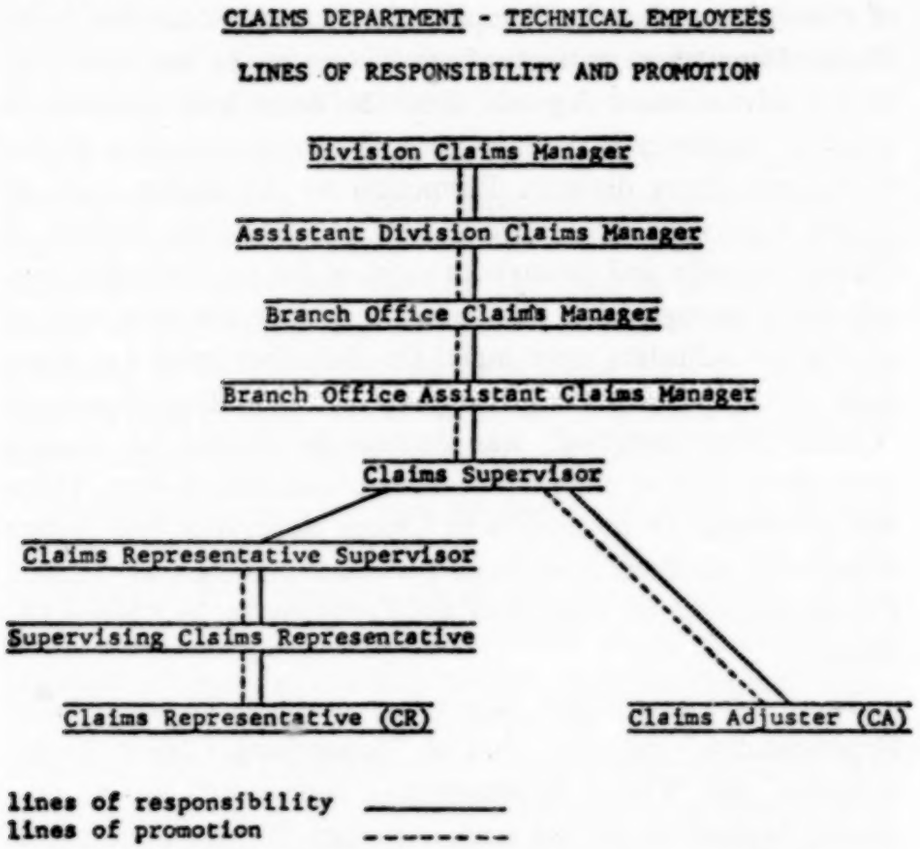
Extensive discovery has been employed and the Plaintiffs now file a motion for partial summary judgment on certain of the issues raised. It is agreed between the parties that one of the issues, designated the "equal pay" issue, is not susceptible of summary judgment at this time because there are disputed issues of fact with respect to whether or not the work performed by women in the job classification of "Claims Representative" was equal to the work performed by men in the job classification of "Claims Adjuster" for which they were paid a substantially higher salary. However, the Plaintiffs at this time allege that there is no genuine issue as to any material fact with respect to the job classification under which men and women were originally hired as technical employees in the Claims Department, with regard to the promotional policy within the Claims Department, and with regard to the pregnancy and maternity leave policies of the Company including the disability income protection plan of the Company as applied to women on maternity leave.

The key point of discrimination set forth in the pleadings, evidentiary material and briefs of the plaintiffs, and the *amicus curiae* brief of the United States Equal Employment Opportunity

Commission is the hiring policy of the Company, since original assignment in effect determines the employee's future chances of promotion within the Company. Because the Company in its Claims Department promotes from its own ranks, the opportunity for advancement depends upon the entry level position to which an employee is assigned upon first being employed by the Company's claim division. Promotion to the higher rank of Claims Supervisor was limited to persons holding the position of Claims Adjuster and throughout most of the period under consideration through 1970 was limited to male employees because all Claims Adjusters were male. On the other hand the entry level classification in the Company's Claims Department of "Claims Representative" was exclusively limited to women throughout most of the period under consideration here. There was no avenue of promotion to Claims Supervisor and higher supervisory positions from those personnel classified as "Claims Representatives" on entry into the Company in its Claims Division.

There were two higher supervisory positions in the "Claims Representative" category, that of "Supervising Claims Representative" and "Claims Representative Supervisor", but no promotion beyond the second rank. Although the line of responsibility from "Claims Representative Supervisor" runs to "Claims Supervisor" there is no similar line of promotion because all "Claims Supervisors" are drawn from the ranks of "Claims Adjuster".

The lines of responsibility and promotion are illustrated as follows:



The same educational requirements were in 1965 and thereafter until 1970 with respect to the hiring of "Claims Adjusters" and "Claims Representatives", a college degree. No prior experience in the insurance business was required and in fact the Company did not hire persons who had worked for other insurance companies in its entry level positions in the Claims Department.

Although the Defendant Company had employed "Claims Adjusters" for a long period of time the position of "Claims Representative" was created in mid-1965. The position was created when the Company had decided to handle more of its claims work from inside its offices. A recruiting brochure for this position was prepared and circulated through college

placement offices and employment agencies. The qualification for the "Claims Representative" position included a college degree. The recruiting brochure is entirely female oriented. Its title page bears the caption and picture identifying the position as a job fit for a queen. It shows women in its illustrations of persons performing their duties in this capacity. Between July 1, 1965 and the end of 1966, 401 persons were hired for the positions of "Claims Representative", not one of which was male. Between July 1, 1965 and March 17, 1972, 2,329 persons were hired as "Claims Representatives" of which 2,302 or 98.84% were women. The first male "Claims Representative" was hired in 1969, four in 1970, and twenty in 1971. During the period from 1965 until the end of 1970, the Company hired over 2,000 "Claims Adjusters", not one of which was female.

The recruiting brochure used by the Company during this period describing the position and duties of "Claims Adjusters" was entirely male oriented, its illustrations showing men performing the duties of the position, and bearing the legend in large type, "Are you the right man?", and reciting the avenues of advancement from Claims Adjuster through Branch Office Claims Manager, Division Claims Manager, Manager Home Office Examiners' Division, and so on up the ladder. The Company promoted to advanced positions in its Claims Department solely from those persons who had served it in the capacity of "Claims Adjuster".

The two Representative Plaintiffs were hired in the position of "Claims Representative" and they have deposed that in answer to their inquiries they were informed that the position of "Claims Adjuster", the beginning of the promotional ladder in the Claims Department, was not available for women. It has been admitted by representatives of the Defendant that the two named Representative Plaintiffs were qualified for the position of "Claims Adjuster" at the time of the original hiring.

It would serve little purpose to recite in detail the great mass of statistical evidence which the Plaintiffs have produced in support of their contention that the two initial entry positions were segregated between male and female applicants, that the educational requirement for both positions was the same, that no prior insurance experience was required for either position, that the functions performed in these positions were very similar that the pay differential between the positions was substantial, being approximately $2,500 per year greater for the Claims Adjuster, that prior to 1971 no opportunity was given to women "Claims Representatives" to qualify for the position of "Claims Adjuster", and that all promotions to higher positions in the Claims Department were made from the ranks of the exclusively male "Claims Adjuster" classification.

In addition to the statistical evidence which is unrebutted here the Plaintiffs have produced additional supporting evidence of the Company's employment policies with respect to women in the Claims Division. Much of this evidence is in the form of oral testimony and affidavits which may be subject to a question of credibility but a good deal of the supporting evidence is documentary and supports the Plaintiffs' contention of a recognized pattern of treating the male and female employees in the Claims Department differently in respect to recruitment, hiring classifications, promotional opportunities, and salary.

We are not speaking of salary or compensation with respect to the question of whether equal pay was given for the same work but in connection with the entry level salary paid for the two classifications and the salary differential between "Claims Representatives" of considerable experience and the starting salary which they could receive when openings were finally made available to "Claims Representatives" to become "Claims Adjusters".

Two sections of Fed. R. Civ. P. 56 are applicable to our consideration of Plaintiffs' motion for summary judgment. Fed. R. Civ. P. 56(c) provides in part:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and [the] admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law."

and Fed. R. Civ. P. 56(e) which provides in part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits, or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The Plaintiffs have relied chiefly on statistical evidence in support of their contention of discriminatory employment policies and in many cases the courts have accepted such evidence in determination of whether Title VII has been violated. Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421 [8th Cir. 1970]; Witherspoon v. Mercury Freight Lines, Inc., 457 F. 2d 496 [5th Cir. 1972]; Bing v. Roadway Express, Inc., 444 F. 2d 687 [5th Cir. 1971]; Rowe v. General Motors Corp., 457 F. 2d 348 [5th Cir. 1972]. In accordance with these decisions and under the doctrine of McDonnell Douglas Corp. v. Green, 411 U. S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 [1973], once the plaintiff has established a prima facie case by setting forth statistics of this kind the burden is on the employer to sufficiently explain the disparity in hiring; conclusory statements that the employer never discriminated in hiring is insufficient to satisfy this burden. As stated in *McDonnell*, supra, "The burden then must shift to the employer to articulate some legitimate, non-discriminatory reason for the respondent's rejection." (p. 802, 93 S. Ct. p. 1824). We are of the opinion that the Defendant's response to the Plaintiffs' motion for summary judgment fails to address this burden at all, let alone rebut the Plaintiffs' evidence.

The response of the Defendant raises eight issues of defense, as follows:

1.

Neither of the named Representative Plaintiffs is currently in the employ of the Defendant. This is not a contested issue of fact. The Plaintiffs admit that both the representative party Plaintiffs have left the employ of Defendant and the question of whether or not their termination from employment was voluntary or forced by discriminatory employment practices of the Defendant is not an issue before us at this time. This is a matter of law concerning standing and it has been held that a former employee may bring an action to enforce rights under this statute claimed to have been infringed. In Hackett v. McGuire Bros., Inc., 445 F. 2d 442 [3d Cir. 1971] this contention was rejected;

> "The national public policy reflected . . . in Title VII . . . may not be frustrated by the development of overly technical judicial doctrines of standing or election of remedies. If the plaintiff is sufficiently aggrieved so that he claims enough injury in fact to present a genuine case or controversy in the Article III sense, then he should have standing to sue in his own right and as a class representative." (pp. 446, 447).

The Circuit Court continued:

> "A person claiming to be aggrieved may never have been an employee of the defendant. Indeed the Act forbids discrimination not only by employers, 42 U. S. C. § 2000e-2(a)(2), but also by potential employers, 42 U. S. C. § 2000e-2(a)(1), by labor organizations, 42 U. S. C. § 2000e-2(c), and by employment agencies, 42 U. S. C. § 2000e-2(b). An aggrieved person obviously is any person aggrieved by any of the forbidden practices. (pp. 445-446).

An interesting commentary on the argument asserted to this court was made in Reed v. Arlington Hotel Co., Inc., 476 F. 2d 721 [8th Cir. 1973]:

> ". . . if this kind of an individual [a discharged employee, not seeking reinstatement] would be prevented from bringing class actions as the rules permit, there would be a windfall for the employer, and when any such matter was coming up, all they would have to do is discharge the employee . . ." (p. 723).

2.

The Defendant argues that the representative party Plaintiffs were offered "Claims Adjuster" status and has filed evidence to this effect. This is not denied by Plaintiffs but they contend that the terms of the offer were unacceptable and were made after the charges of discrimination were filed in this case with the United States Equal Employment Opportunity Commission in 1971. We find this to be a disputed issue of fact which may be relevant to the question of damages of the representative party Plaintiffs, but irrelevant to the question of violation of the statute which is before us. Under all circumstances, it is shown by the evidence that the offer of "Claims Adjuster" status was made long after the effective date of the statute in question, after both representative Plaintiffs had been employed in the positions of "Claims Representatives" for several years, and after the filing of the Complaints before the EEOC in this matter.

3.

Defendant claims that there is a dispute as to the content of conversations between representatives of the Company and a representative of the Pennsylvania Human Relations Commission. This alleged conversation bears on the Company's motive and intent in offering "Claims Adjuster" status to the named-Plaintiffs at the time that it did. We find this completely immaterial to the issue before us at this time because the offer of Claims Adjuster status was not made until the alleged discriminatory practices in violation of Title VII of the Act had continued for several years and the issue had been raised

by a Complaint to the Equal Employment Opportunity Commission by the named Plaintiffs.

4.

The Defendant contends that there is a disputed issue of fact on the question of whether or not the qualifications and entrance requirements for the position of "Claims Adjuster" are substantially different from those of "Claims Representative". Although with respect to the duties and responsibilities of each position which we have previously designated as the "equal pay" issue, not before the Court on this Summary Judgment motion, nevertheless we are concerned at this time with whether or not qualified female applicants were excluded from the position of "Claims Adjuster" and its subsequent promotional ladder. The statistical evidence shows that of more than 2,000 persons hired for the position of "Claims Adjuster" up through 1970, not one was female. The Defendant's own representatives have admitted that the representative Plaintiffs in this case were qualified for the position of "Claims Adjuster" at the time of original hiring. Therefore, we find that the Defendant has not met the burden of showing why no female personnel were hired for the "Claims Adjuster" position during the period following the effective date of Title VII until sometime after August 1971 and subsequent to the filing of complaints in the within matter. Plaintiff's contention is further supported by evidence that no female employees occupied the supervisory position of "Claims Supervisor" in the Company which were filled from the ranks of the "Claim Adjusters" until at least 1970. If the jobs were substantially dissimilar as the Defendant claims, the differential in starting salary may be justified but the total exclusion of women from entry into the higher paid "Claims Adjuster" position would remain as a discriminatory practice, and the promotional policy of the company in drawing all of its supervisory personnel from the ranks of the exclusively male "Claims Adjusters" continued

and emphasized the discriminatory effect of the policy. Therefore, we find that the Defendant's argument of a difference in the qualifications or duties of the two positions is immaterial to the Plaintiffs' charge that women were discriminated against in the selection of persons to fill the "Claim Adjuster" position. The company has offered no evidence of any bonafide occupational qualification to justify the complete exclusion of women for this position for over a period of five years, particularly in view of its later determination that some women "Claims Representatives" were qualified for and were offered these positions.

5.

The Defendant argues that it is not clearly established by the evidence that a large number of Defendant's female employees were desirous of and qualified for better positions. We cannot see the materiality of this argument to the question presently before us. The undisputed evidence establishes that after charges were filed in this case, the Defendant did interview its "Claims Representatives" and that 10% of them were offered and accepted positions as "Claims Adjusters". It was further established by testimony of a Company representative that the Company considered one-third of its women "Claims Representatives" to be qualified for the position of "Claims Adjuster". We fail to see how these facts alter the statistical evidence that of the more than 2,000 "Claims Adjusters" hired between 1965 and 1970 none were women, that all of the "Claims Representatives" hired during this period were women, that no woman in the job classification of "Claims Representative" was ever promoted to the supervisory position of "Claims Supervisor" during this period; that the Company deliberately engaged in the recruitment of women for the "Claims Representative" position and represented the "Claims Adjuster" position to be solely a position for male applicants.

6.

The Defendant objects to using the import of the recruiting brochures which were offered in evidence by Plaintiffs and has shown that they have since been superseded by new recruiting literature that is not sex oriented. However, in this matter as in several other matters offered in defense in this case the evidence shows that the Company policy changed after having been continued for a period of approximately five years from the effective date of Title VII and after the threat of the instant litigation became imminent. While the change in Company policy may affect the question of the amount of damages for which it may be liable, we cannot see what effect it has on the liability of Defendant for its policy from and after July 2, 1965.

7.

The Defendant disputes the Plaintiffs' statement that Defendant discouraged acceptances for the offer given to female "Claims Representatives" for re-classification to the position of "Claims Adjuster". We do not find this to be a dispute on a material issue of fact. Whether or not the company discouraged its female "Claims Representatives" from accepting the offered position of "Claims Adjuster", after that occupational classification was opened to women is immaterial to the issue of whether or not the Company practiced discrimination in its employment policies from and after July 2, 1965.

For the purposes of this motion we may assume that the Company did not discourage its female employees from accepting offers to transfer to the classification of "Claims Adjuster."

8.

The Defendant disputes the inferences which the Plaintiffs draw from the facts that no women were promoted to the positions of Branch Office Claims Manager and above. Whether

or not there is a dispute from these inferences the undisputed fact remains that no women in the Defendant's organization were promoted to or held these positions, and the Defendant has failed to come forward with any evidence to explain or refute the disparity in promotional practices.

II.

A second issue presented by Plaintiffs' motion for summary judgment may be broadly categorized as the maternity leave issue. This in turn is divided into two sub-issues which we label as

(a) the maternity leave conditions of employment and
(b) the income protection plan as applied to maternity leave.

(a) *Maternity leave policy.*

Until March 1967, the Company policy was to terminate the employment of a pregnant employee at the end of her sixth month of pregnancy. Thereafter, until September 1970 the policy was to terminate an employee after the eighth month of pregnancy. An employee so terminated could be re-employed, at the sole discretion of the Company, if she re-applied for employment after the birth of her child and if there was a position, available.

In September 1970, Company policy was changed to require pregnant employees either to terminate employment or to take a leave of absence at the end of the eighth month and to return to work either within six months of the date of termination of employment or three months from date of delivery, whichever comes first.

In November 1971, Company policy was again changed to permit an employee to work for as long as her physician certifies her ability to work prior to commencing a maternity leave of absence.

(a) *Income Protection Policy.*

The Company provides as a fringe benefit of employment an Income Protection Plan which provides for the payment of income during periods of disability. This plan is funded by insurance benefits. The only long term disability for which no benefits are provided is pregnancy. Furthermore, the Defendant's health insurance plan provides coverage for children of employees who are working for the Company at the time of the birth of the child, and this excludes from coverage the child of an employee who is absent on a maternity leave of absence at the time of the birth of the child.

There is no disputed issue of fact as to the provisions of the maternity leave policies and the fringe benefit coverage of Defendant Company. The question presented to us is solely a matter of law as the application of Title VII to these undisputed facts.

A threshold question raised by Defendant is that the Plaintiffs have not fulfilled the statutory requirement of exhaustion of the administrative remedy, 42 U. S. C. § 2000e-5(e) because the charges filed by these Plaintiffs with the EEOC never mentioned this aspect of the complaint. The policy of the statute is to give the EEOC an opportunity to investigate and conciliate charges of discrimination.

The strongest case urged by Defendant Company is Tedford v. Airco Reduction Co., 4 F.E.P. Cases 406 [5th Cir. 1972], where the Court of Appeals reversed the dismissal by the District Court of a claim for discriminatory hiring practices because of mootness. The Appeals Court held that the subsequent hiring of plaintiff did not extinguish plaintiff's claim for back wages. However, the Court of Appeals did sustain the dismissal of claims of a discriminatory seniority system and discriminatory job assignments because,

> "the only factual allegation in Tedford's EEOC complaint was that Airco had refused to hire him as a truck driver because of his race."
>
> • • • • •
>
> "But giving this factual allegation the most generous construction possible, we still are unable to conclude that the investigation could properly have extended to Airco's seniority system, the driver lists, and the like. A charge filed before the EEOC is not a plenary charter for a Commission investigation of every aspect of a company's employment practices. The conclusion is unavoidable that the EEOC has never been called upon to investigate these practices, and accordingly that litigation of their validity in federal court is premature." 4 F.E.P. Cases, p. 409.

However, this was the same Circuit Court that decided Sanchez v. Standard Brands, 431 F. 2d 455 [5th Cir. 1970], and the *Tedford* court gave due regard to the *Sanchez* doctrine.

However, the courts have not restricted a plaintiff's suit under 42 U. S. C. § 2000e-5(e) to the specific issues raised before the EEOC, nor to the specific findings of the EEOC.

> "Respondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue, 42 U. S. C. §§ 2000e-5(a) and 2000e-5(e). The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts. . . . and the courts of appeal have held that, in view of the large volume of complaints before the Commission and the nonadversary character of many of its proceedings 'court actions under Title VII are de novo proceedings and . . . a Commission "no reasonable cause" finding does not bar a lawsuit in the case.' Robinson v. Lorillard Corp., 444 F. 2d 791, 800 [C.A. 4, 1971]; Beverly v. Lone Star Lead Construction Corp., 437 F. 2d 1136 [C.A. 5,

1971]; Flowers v. Local 6, Laborers International Union of North America, 431 F. 2d 205 [C.A. 7, 1971]; Fekete v. United States Steel Corp., 424 F. 2d 331 [C.A. 3, 1970]." McDonnell Douglas Corp. v. Green, 411 U. S. 792, 798-799, 93 S. Ct. 1817, 1822, 1823, 36 L. Ed. 2d 668 [1973].

In Sanchez v. Standard Brands, Inc., cit. supra, it was explained that in filing a charge with the EEOC an aggrieved person is supplied with a simple one-page charge form in which a row of boxes is provided to check the category of discrimination. We have as Exhibits in the present case the Notice of Charge which the EEOC gave to Defendant Company for each case which indicates "Basis of Discrimination—Sex", and "Nature of Charge—Promotion—Terms and Conditions." The *Sanchez* court found that no charging party should be barred from the assertion of a charge because of the technicality of his description.

> "Surely the only procedural requirement which should confront a Title VII complainant is the requirement that he state, within the ninety-day period, *facts* sufficient to trigger a Commission investigation. 431 F. 2d p. 462.

Sanchez continues:

> "At least one district court in this circuit has addressed itself to the question, however, and in our judgment it responded to the question by giving the correct answer. In King v. Georgia Power Co., N. D. Ga. 1968, 295 F. Supp. 943, Judge Smith held that the allegations in a judicial complaint filed pursuant to Title VII 'may encompass any kind of discrimination like or related to allegations contained in the charge and growing out of such allegation during the pendency of the case before the Commission.' 295 F. Supp. at 947. In other words, the 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." 431 F. 2d p. 466.

It appeared from oral argument that Defendant, although it had received the "Notice of Charge of Employment Discrimination", had not seen copies of the original charges filed by Plaintiffs with the Commission before the argument. It appeared that they had never been requested. They were supplied to the court and counsel the day following the argument on this motion. The charge of Plaintiff Mari Ross states, inter alia, "During interview for position as claims representative was subjected to questions regarding marital situation and birth control." Furthermore, the Plaintiffs were required to pursue their charges through an appropriate state agency, the Pennsylvania Human Relations Commission, which on July 1, 1971, sent to Defendant a Complaint which recited, inter alia:

> "The complainants further allege that female applicants, as a condition of hire, are subjected to inquiries about anticipated marriage and family size, while men are not similarly evaluated as a condition of hire."
> (*Aune, Deposition, Exhibition 1*).

The court believes that the Representative Plaintiffs have properly employed the administrative procedures of Title VII which are a prerequisite to suit in the district court, they have properly raised the issue of sex discrimination in the "terms and conditions" of employment, that they specifically raised allegations of discrimination in respect to marital status and family planning sufficient to satisfy the administrative investigation requirement for raising the specific question of sex discrimination in maternity leave and pregnancy disability income policies in the present lawsuit.

As a point of departure in considering the merits of Plaintiffs' charges of sex discrimination with respect to Defendant's maternity leave and pregnancy disability income protection policies it might appear to the lay mind that we are treading on the brink of a precipice of absurdity. Perhaps the admonition of Professor Thomas Reed Powell to his law students is apt; "If you can think of something which is inextricably related to some

other thing and not think of the other thing, you have a legal mind."

We are dealing with a statute enacted by the Congress of the United States which says:

> "It shall be unlawful employment practices for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's . . . sex; or
>
> (2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex." 42 U. S. C. § 2000e—2(a).

The defendant argues that its policies with regard to maternity leave and income protection for disability excluding pregnancy are not sex discriminatory because pregnancy is "sui generis" and thus subject to special treatment.

We believe that the court may take judicial notice of certain well known facts and statistics to illustrate the problem. We have taken our statistics from the United States Census figures as published in the 1974 edition of the World Almanac. In 1970, according to the census figures, there were 105,000,000 women and 100,000,000 men in the United States. In 1972 there were 31,000,000 women and 51,000,000 men, sixteen years of age and upwards, employed in the United States. Women between the ages of fourteen through forty-four amounted to 43.5% of the total female population or 45,675,000 women, which we equate with the childbearing age. There is a necessary overlapping of the 31,000,000 women in the work force sixteen years of age and older, and the 45,000,000 women in the childbearing ages of fourteen to forty-four. There were 3,191,000 live births in the United States in the year ending

June 30, 1973 which produces a birth rate of about fifteen per 1,000 of total population, but a fertility rate of sixty-nine births per 1,000 women fifteen to forty-four years of age. We recognize that more precise statistics are available but we are not concerned with minutiae and only recite these figures to illustrate the scope of the problem. Pregnancy is a natural condition, it is an expectable condition, it is a statistically foreseeable condition, and ultimately it is a necessary condition. It is a condition limited to women, not by statutory law or custom, but by biological law. If three-eighths of our employee working force consists of women, and their age group necessarily overlaps in large measure the childbearing age group, pregnancy is certain to occur in a statistically expectable number of employees. We have no doubt that a large insurance company is well aware of the precise statistics. We further note from this case that the defendant's recruiting policies for female technical employees in its claims department was aimed at young women finishing their college education, and that its promotional policy was to advance personnel within its own ranks and not draw upon outside sources. This policy would only increase the incidence of young women of childbearing age among the female employees of a growing business organization such as Defendant, which hired over 2,000 new female claims representatives in a five year period.

Because pregnancy is a natural, expectable, and societally necessary condition, which is certain to occur in a statistically predictable number of women in the labor force, we see no merit in Defendant's argument that it may be excluded from equality of treatment in conditions and benefits of employment because it is a voluntary condition. Whether voluntary or not, it occurs with certainty and regularity. The distinction drawn between one hiring policy for men and another for women—each having pre-school age children—was rejected by the Supreme Court in Phillips v. Martin Marietta Corp., 400 U. S. 542, 544, 90 S. Ct. 496, 27 L. Ed. 2d 613 [1971] where there was no showing that the condition in question is a bona-

fide occupational qualification necessary to the operation of that particular business or enterprise.

The United States Equal Employment Opportunity Commission which is the administrative body created by Title VII to administer the Act, has issued the following Guidelines with respect to the question at issue:

> § 1604.10 Employment policies relating to pregnancy and childbirth.
>
> (a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in *prima facie* violation of Title VII.
>
> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery, therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.
>
> (c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employee of one sex and is not justified by business necessity.
>
> 29 C. F. R. Labor, Chapter XIV, Part 1604, As Amended (As of March 31, 1972).
>
> § 1604.9 Fringe benefits.
>
> (a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

> (b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.
>
> 29 C. F. R. *idem.*

We give full recognition to the principle urged upon us that the EEOC Guidelines, 29 C. F. R. § 1604.10, effective April 5, 1972, do not have the force of law in the sense that the "regulations" or "substantive rules" of an administrative body authorized by statute to promulgate regulations to implement existing law have a binding effect. We also recognize that the Guidelines are interpretive statements of what the administrative officer thinks the regulations mean. Gibson Wine Co. Inc. v. Snyder, 90 U. S. App. D. C. 135, 194 F. 2d 329 [1951]. We are not compelled to follow them, but some deference is due. Espinoza v. Farah Manufacturing Co., 462 F. 2d 1331, 1335 [6th Cir. 1972].

Our own Court of Appeals states it more strongly:

> "Such an administrative interpretation is entitled to great deference. Griggs v. Duke Power Co., 401 U.S. 424, 433-434, 91 S. Ct. 849, 28 L. Ed. 2d 158 [1971]; Udall v. Tallman, 380 U.S. 1, 85 S. Ct. 792, 13 L. Ed. 2d 616 [1965]. That the guideline was not promulgated until after this suit was initiated is of no moment. Rights which came into being when the Act was passed are not abrogated by administrative interpretation. Bartmess v. Drewrys U. S. A., Inc., 444 F. 2d 1186 [C.A. 7], cert. denied, 404 U. S. 939, 92 S. Ct. 274, 30 L. Ed. 2d 252 [1971]."
>
> "A reading of the statute convinces us that the commission's interpretation furthers the legislative purpose of the Act and is consistent with the plain meaning of the language employed.
>
> 'Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' Sprogis v. United Air Lines, 444 F. 2d 1194, 1198 [C.A. 7], cert. denied, 404 U.S. 991, 92 S. Ct. 536, 30 L. Ed. 2d 543 [1971]." Rosen v. Public Service Electric and Gas Co., 477 F. 2d 90 [3rd Cir. 1973], at pp. 94-95.

The only current provision of the Defendant's maternity leave policy under attack is the provision that the employee who is granted a leave of absence for maternity must return to work on a date certain or be terminated from employment. Plaintiffs' Complaint is zeroed in on the target that this limitation on leave of absence for temporary disability is only applied to maternity cases. There is no such requirement for any other disability.

Because state and local governments were exempted under Title VII until 1972, there are few Title VII cases involving pregnancy that give us guidelines, but the question has arisen frequently under cases presenting claims of denial of equal protection or denial of civil rights under color of state authority. We believe that Title VII standards are more compelling on a private employer in view of the express statutory mandate upon employers and the absence of the question of a "rational basis" for classification by which a state statute is measured. Dandridge v. Williams, 397 U. S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 [1970]. While a fixed state policy of classification may survive an equal protection attack it may still be violative of Title VII. See Schattman v. Texas Employment Commission, 459 F. 2d 32 [5th Cir. 1972], and Newmon v. Delta Airlines, Inc., 475 F. 2d 768 [5th Cir. 1973].

A district court in the Fifth Circuit has recognized that:

> "*Schattman*, . . . turned upon a divided Appellate Court's interpretation of the federal statute as it then read on the question of its exclusion from coverage of state employers and employees." Vick v. Texas Employment Commission, 6 EPD 5990 [S. D. Tex. Aug. 30, 1973].

However, the *Vick* case found this impediment to jurisdiction removed by the 1972 Amendment to Title VII, and proceeded to find that the state's denial of unemployment benefits on the grounds that the last trimester of pregnancy rendered a woman unavailable for work, violated the provisions of Title VII.

> "While the expectancy of life confined and incident to female pregnancy involves many delicacies of personal, institutional and societal interest, Roe v. Wade, 410 U. S. 113 [93 S. Ct. 705, 35 L. Ed. 2d 147] 41 L. W. 4231 (January 22, 1973), such a natural and necessary female condition cannot be a basis for categorical discrimination in light of Phillips and its plain interpretation of Title VII of the Act." *Vick*, cit supra, 5 EPD p. 5992.

Nevertheless, we can take some guidelines from the Equal Protection Clause cases dealing with pregnancy.

Judge Brown in his dissent in Phillips v. Martin Marietta Corp., 416 F. 2d 1257 [5th Cir. 1969], vacated *per curiam* 400 U. S. 542, 91 S. Ct. 496, 27 L. Ed. 2d 613 [1972] noted with respect to that case, where women with pre-school age children were denied employment, but not men:

> "The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody —and this includes Judges, Solomonic or life tenured— has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman". 416 F. 2d p. 1259.

To the argument that pregnancy is a voluntary status, the court in Buckley v. Coyle Public School System, 476 F. 2d 92 [10th Cir. 1973] says:

> "The fact, if it be a fact, that pregnancy is a voluntary status really has nothing to do with the question. The point is that the regulation penalizes the feminine school teacher for being a woman and, therefore, it must be condemned on that ground." 476 F. 2d at p. 95.

The Court of Appeals reversed the District Court's dismissal and remanded the case to the District Court for determination of a compelling state interest to justify the regulation.

In Green v. Waterford Board of Education, 473 F. 2d 629 [2nd Cir. 1973], the Court of Appeals reversed a District Court's dismissal of a complaint alleging that an inflexible maternity

leave policy denied equal protection. Even though the District Court had found a rational basis for the school board's action, the Court of Appeals found that the state's interests were not sufficiently promoted by rule to justify the arbitrary and inflexible regulation applied to pregnancy as distinguished from other disabilities.

> "The heart of plaintiff's case is that disqualifying a physically capable woman from working because of a condition related solely to her sex is unconstitutionally discriminatory. Plaintiff admits the obvious, that men do not become pregnant, but points out that men, being human, are also subject to crises of the body, some of which, like childbirth, give ample warning: A cataract operation or a prostatectomy, for example, may be planned months ahead. Because male teachers are not forced by defendant Board to take premature leave because of a known forthcoming medical problem, female teachers should not be treated differently. Thus stated, the argument is persuasive, even compelling. One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed." (p. 634).

See also the following Equal Protection clause cases involving maternity leave: LaFleur v. Cleveland Board of Education, 465 F. 2d 1184 [6th Cir. 1972], cert. granted 411 U. S. 947, 93 S. Ct. 1921, 36 L. Ed. 2d 408, but Cf. Cohen v. Chesterfield County School Board, 474 F. 2d 395 [4th Cir. 1973], cert. granted, 411 U. S. 947, 93 S. Ct. 1925, 36 L. Ed. 2d 408.

Defendant has interposed a defense of good faith reliance upon an administrative interpretation, particularly in its defense on the income protection exclusion policy here. This may be a matter to consider when the questions of affirmative relief or back pay are determined but we cannot see its application to the immediate question of the inflexible maternity leave standard. During the period prior to the Guidelines published in March 1972, there were no guidelines or opinions issued by the EEOC. 42 U. S. C. § 2000e-12(b) (Sec. 713(b) of the Act)

provides that "no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or commission complained of was in good faith, in conformity with and in reliance upon any written interpretation or opinion of the Commission."

We do not believe that the various opinion letters referred to in the brief of *amicus curiae* United States Chamber of Commerce, with respect to the inclusion of maternity benefits in an insurance plan meet the requirements of Sec. 713; there is no evidence that defendant relied upon them, they were not addressed to the defendant, and do not otherwise conform to the requirements of a written opinion under which the defense of reliance may be asserted. Local 189 United Papermakers and Paperworkers, etc. v. United States, 416 F. 2d 980 [5th Cir. 1969]; Sprogis v. United Air Lines, Inc., 444 F. 2d 1194 [7th Cir. 1971].

The maternity leave policy of the company which since 1970 has granted a leave of absence for six months from the last date of work before delivery, or for three months from date of delivery, whichever comes first, has no relation to the fitness of any individual female to perform the functions of her job.

The defendant has not alleged, nor has it offered any evidentiary material to establish that there is a disputed issue of fact dependent upon a bona fide occupational qualification. Such a bona fide occupational qualification is a defense to a charge of discrimination where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. This has been narrowly construed by the courts. In Weeks v. Southern Bell Telephone and Telegraph Company, 408 F. 2d 228 [5th Cir. 1969] the Court held this must give the employer "a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." In Rosenfeld v. Southern Pacific Co., 444 F. 2d 1219 [9th

Cir. 1971] the court held the exclusion of women justified only when "the sexual characteristics of the employee are crucial to the successful performance of the job, as they would be for the position of a wet-nurse." Under *Rosenfeld*, if one woman can do the job the employer cannot impose a blanket rule denying all women the opportunity.

Under the company policy any female who cannot return to her job within three months of delivery of her child is automatically terminated. No other disability is cause for such automatic termination. "For a woman, however, the effects of pregnancy and pregnancy-related illness are debilitating in much the same way as the physical and mental conditions that are included within the scope of the disability insurance program." Aiello v. Hansen, 359 F. Supp. 792 [N. D. Cal. 1973].

We conclude, as a matter of law, that the maternity leave policy in effect in Defendant Company at the present time and since September 1970 in the respect in which it requires a female to return to work within three months of the date of delivery of her child, or six months from the beginning of her maternity leave, whichever date is earlier, or face termination of employment, is violative of Sec. 703, of Title VII of the Civil Rights Act of 1964, as amended, in that such policy discriminates against female employees on the basis of sex.

Because only this present policy is still in existence, injunctive relief as to this practice is appropriate at this time.

We further find that all prior company policies in effect since July 2, 1965, which compelled pregnant female employees to leave employment at a fixed period of pregnancy before delivery were likewise violative of the Act, and the company policy in effect since July 2, 1965 which denied reemployment because of pregnancy and maternity were violative of the Act. Because these practices have ended there is no need for injunctive relief, and the question of the intentional nature of the violation and the appropriate relief will be considered in a subsequent stage of these proceedings.

Some additional considerations must be weighed with respect to plaintiffs' claim that the Income Protection Plan of Defendant company is discriminatory to female employees. The Company provides its employees with a contributory insurance plan for continuation of income for a "long term illness", i.e. an illness requiring treatment by a doctor of eight or more calendar days which causes absence from work. Such "benefits are not payable for disability due to occupational injury or to sickness covered under Workmen's Compensation Insurance; for disability due to pregnancy; for a disability in excess of 104 weeks; or for a disability during which you were not treated by a physician licensed to practice medicine."

Pregnancy is the only disability, not within the other exceptions, not covered by the Income Protection Plan. Pregnancy is a condition limited to women. Conditions limited to men, such as prostate troubles, are not excluded, nor is any exclusion provided for a number of illnesses whose incidence among males is greatly predominant (i.e. gout 19 to 1; the Merck Manual, 10th ed. 1961).

The brief of the United States Chamber of Commerce as amicus curiae cites cost of the program if pregnancy were included, as a justification for exclusion.

We must emphasize the distinction made by the Guidelines, § 1604.10(b) that it is "disabilities caused or contributed by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom" which for job-related purposes are to be treated as temporary disabilities. They do not cover leave for child rearing, but only for job disability. No evidence has been presented to us by Defendant as to the average duration of pregnancy disability. Again, we have a difficult time in freeing ourselves from stereotype thinking. We note that the Defendant's policy for maternity leave prior to delivery has accommodated itself from a fixed number of months prior to delivery to the recognition that an employee may work prior to delivery as long as she is able to do the job. Return to work may be made as soon after

delivery as she is able to do the job. We may assume from a general knowledge of the conditions of life, that in the normal or usual pregnancy, the period of disability will be relatively short. There is nothing in this record to show, and nothing in our general experience with life indicates that the job-related incidence of disability for pregnancy is any greater or any less than that for a prostatectomy.

The EEOC Guidelines provide, § 1604.9 Fringe Benefits, (e):

> "It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other."

While cost may be a business purpose, and certainly to add pregnancy disability to the insurance program will cost more, it can only be a defense in a Title VII action where

> ". . . there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact, the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact. (footnotes omitted.) Robinson v. Lorillard Corporation, 444 F. 2d 791, 798 [4th Cir. 1971].

With respect to the argument of increased costs there is no statutory requirement that Defendant company offer any particular disability benefits, in any specific amount, or of any particular duration. The only requirement is that there be no inequality based on sex. Adjustments in the benefit plan to achieve equality are a recognized means of achieving that end. Rosen v. Public Service Electric Co. cit supra (p. 95); Hays v. Potlatch Forests, Inc., 465 F. 2d 1081 [8th Cir. 1972].

> "The increased costs could be accommodated quite easily by making reasonable changes in the contribution rate, the maximum benefits allowable, and the other variables affecting the solvency of the program." Aiello v. Hansen, 359 F. Supp. 792, at p. 798 [N. D. Cal. 1973].

A final requirement for a finding of violation of Title VII is that the court must find that defendant "has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint" in order to issue an injunction or to order such affirmative action as may be appropriate. While we are not now concerned with any question of relief in which the questions of back pay or reinstatement may be considered, certain continuing policies of defendant are subject to immediate injunctive relief, and require a finding of intentional action. Defendant has raised no question of intentional violation, except as to its defense of good faith reliance on administrative interpretation which we have found insufficient. The term "intentional" in this Act means that the Defendant intended to do what it did, not that there was a wilful and deliberate intention to violate the law.

> ". . . intentional unfair employment practices are those engaged in deliberately and not accidentally. No willfulness on the part of the employer need be shown to establish a violation of Sec. 706(g)." Kober v. Westinghouse Electric Corp., 408 F. 2d 240, 246 [3rd Cir. 1973].

We, therefore, find that the violations of Title VII of the Act herein charged were intentional within the terms of that statute.

We, therefore, conclude that as to the issues raised by Plaintiffs' Motion for Partial Summary Judgment, there is no genuine issue as to material fact and that summary judgment interlocutory in character should be entered on those issues.

Because the evidentiary materials show that at certain times subsequent to the effective date of the Act, or subsequent to the filing of the administrative charge or the within Complaint the Defendant has ceased or discontinued the discriminatory practice, injunctive relief is not appropriate as to those practices. Kober v. Westinghouse Elec. Co., supra, p. 250.

As to continuing practices which violate Title VII preliminary injunctive relief at this time is appropriate.

The question of other affirmative relief for past actions is not now before us. The Court is mandated to issue "such affirmative relief as may be appropriate". *Kober*, cit supra. This will depend upon the evidence to be presented on the individual claims, which may be considered at the time of trial of the "equal pay" issue not here considered.

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania
* * (Caption—72-169) * *

MEMORANDUM ORDER ON MOTION TO RECONSIDER

The Defendant Liberty Mutual Insurance Company has moved the court to reconsider that portion of its Order of January 9, 1974, that found that the Defendant's policy of requiring female employees to return to work within three months of delivery or be terminated and its policy of denying the benefits of the disability income protection plan to female employees for any disability related to pregnancy or childbirth are violations of Title VII of the Civil Rights Act of 1964.

Defendant brings to our attention the decision of the Northern District of Georgia in Newmon v. Delta Air Lines, Inc., Civil Action No. 15681, issued December 31, 1973 of which this court was unaware at the time of its January 9, 1974 order. We have considered that Opinion and its Findings which, in many parts are in complete accord with the Findings of this Court. However, we do disagree with the Finding of that court that pregnancy is not a "disability".

We do note that the decision in Newmon v. Delta Air Lines, Inc. was made after a consideration of a great deal of evidentiary material presented by both parties in that case concerning working conditions, the type of work performed, the preference of the woman, the accessibility of a hospital, and, of course, the possibility of complications to both mother and child in pregnancy cases. The court also considered whether or not the defendant Airlines maternity leave policy was "reasonably necessary to the normal operation of the airlines business".

The remainder of Defendant's motion continues the argument that it is impossible for Defendant to present any statistical material of the cost of extending disability benefits to pregnancy because no statistics are available. Whether such statistics are

available or not, the Defendant made no attempt to produce any such evidence before this court. The court cannot understand why the disability from performing work due to pregnancy or childbirth cannot be medically determined in the same way that disability from performing work is medically determined in all other disability cases. For a half century or more in this country, and for over a century in European countries, these matters are decided in hundreds, if not thousands of cases daily.

Finally, the Defendant argues that "because employees can, in some situations, make as much or more money by receiving disability income it can be assumed that females on pregnancy leave of absence will remain at home longer than normal." The Defendant presented absolutely no evidence to support this argument and as a trial judge who has seen hundreds of cases of soft tissue damage arising from the so-called "whip lash" type of injuries which produce few observable objective symptoms the court sees no basis for assigning the tendency to malinger as a sex-related characteristic. If as defendant suggests, the employee can make as much or more money on disability than at work be true, then the fault lies with the particular insurance plan and not with the female sex. The motion for reconsideration will be denied.

In its Order the court stated it would enjoin the continuance of practices which the court found to be in violation of Title VII. The Plaintiffs were invited to submit the form of the injunction order and the Defendant has filed Notice of Appeal and asked for stay of any injunctive order. Under these circumstances the court will withhold the issuance of the injunctive order and amend the Order previously issued under the provisions of Fed. R. Civ. P. 54(b), as follows:

And now this 20th day of February, 1974, it is directed that final judgment be entered in favor of Plaintiffs that Defendant's policy of requiring female employees to return to work within three months of delivery of a child or be terminated is in violation of the provisions of Title VII of the Civil Rights Act of

1964; that Defendant's policy of denying disability income protection plan benefits to female employees for disabilities related to pregnancies or childbirth are in violation of Title VII of the Civil Rights Act of 1964 and that it is expressly directed that Judgment be entered for the Plaintiffs upon these claims of Plaintiffs' Complaint; there being no just reason for delay.

Supreme Court, U. S.
FILED
APR 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,
Defendant-Petitioner,
v.
SANDRA WETZEL and MARI ROSS, on behalf
of themselves and all others
similarly situated,
Plaintiffs-Respondents.

Petition For A Writ Of Certiorari To The
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

JOHN G. WAYMAN
SCOTT F. ZIMMERMAN
WALTER P. DEFOREST
MARTHA H. MUNSCH
REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15219
Counsel for *Amicus Curiae*,
Westinghouse Electric Corporation

Of Counsel:
RONALD G. INGHAM
Westinghouse Electric Corporation
Gateway Center
Pittsburgh, Pennsylvania 15222

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

INDEX

	PAGE
Interest of Westinghouse Electric Corporation	2
Question Presented	3
Statement of the Case	3
Reasons for Granting the Writ	4
I. The Petition For Certiorari Should Be Granted Because The Court Below Has Decided An Important Question Of Federal Law Which Has Not Been But Should Be Settled By This Court	4
A. The Court Below Has Decided A Question Of Federal Statutory Interpretation Which Has National Implications	4
B. The Court Below Has Decided An Important Question Of Federal Law Upon Which The Courts Have Differed	8
II. The Petition For Certiorari Should Be Granted Because The Decision Of The Court Below Is Inconsistent With This Court's Decision In *Geduldig v. Aiello* And Is Otherwise Erroneous	9
Conclusion	17

TABLE OF CITATIONS

CASES	PAGE
Austerman, et al. v. Westinghouse Electric Corporation, Civil Action No. 75-229, U.S. D.C., Western District of Pennsylvania, filed February 21, 1975	8
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)	13
Communications Workers of America v. American Telephone & Telegraph Company, No. 74-2191, 2d Cir., March 26, 1975, *reversing* 379 F.Supp. 679 (S.D. N.Y. 1974)	9
Communications Workers of America v. Illinois Bell, 73-C-959, U.S. D.C., Northern District of Illinois, filed April 13, 1973	8

CASES — PAGE

Communications Workers of America v. The Pacific Telephone & Telegraph Co., Civil Action No. C-73-1739 RFP, U.S. D.C., Northern District of California, filed September 28, 1973 8

Communications Workers of America v. South Central Bell Tel. Co., Civil Action No. 73-1711 Section A, U.S. D.C., Eastern District of Louisiana, filed July 5, 1973 8

Communications Workers of America v. Southern Bell Telephone & Telegraph, Civil Action No. 18328, U.S. D.C., Northern District of Georgia, filed May 17, 1973 8

Eberts, et al. v. Westinghouse Electric Corporation, Civil Action No. 74-113, U.S. D.C., Western District of Pennsylvania, filed February 5, 1974 8

Frontiero v. Richardson, 411 U.S. 677 (1973) 13

Geduldig v. Aiello, 417 U.S. 484 (1974) 6, 8, 9, 10, 11, 12, 13, 14, 15

Gilbert v. General Electric Company, 375 F.Supp. 367 (E.D. Va. 1974), *appeal docketed,* No. 74-1557 (4th Cir. 1974) 6

Grogg v. General Motors Corporation, Civil Action No. 73 Civ. 63, U.S. D.C., Southern District of New York, filed January 4, 1973 8

Newmon v. Delta Airlines, Inc., 374 F.Supp. 238 (N.D. Ga. 1973) 8

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) 13

Reed v. Reed, 404 U.S. 71 (1971) 13

Wetzel and Ross v. Liberty Mutual Insurance Company, No. 74-1233, 3d Cir., February 11, 1975.... 10

PAGE

U. S. CONSTITUTION

Equal Rights Amendment 14, 15

Fourteenth Amendment 10, 11, 13

FEDERAL STATUTES

Civil Rights Act of 1964, Title VII, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e, *et seq.* 2, 3, 4, 5, 8, 9, 12, 15, 16

LEGISLATIVE HISTORY

117 Cong. Rec. H 9368 (daily ed. Oct. 12, 1971) 14

117 Cong. Rec. H 9392 (daily ed. Oct. 12, 1971) 14

118 Cong. Rec. S 4612 (daily ed. March 22, 1972) 15

Hearings Before Subcomm. 4 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. (1971) 14, 15

Hearings on S. J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Judiciary Comm., 91st Cong., 2d Sess. (1970) 15

MISCELLANEOUS

Quinn et al., *Evaluating working conditions in America,* MONTHLY LABOR REVIEW, Vol. 96, November 1973, at 32 5

Research Summaries, MONTHLY LABOR REVIEW, Vol. 98, January 1975, at 61 5

U. S. Department of Labor, Bureau of Labor Statistics, Digest of 100 Selected Health Insurance Plans Under Collective Bargaining, Early 1966, Bull. No. 1502 (September 1966) 5, 6

Waldman and McEaddy, *Where women work—an analysis by industry and occupation,* MONTHLY LABOR REVIEW, Vol. 97, May 1974, at 3 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,
Defendant-Petitioner,
v.
SANDRA WETZEL and MARI ROSS, on behalf
of themselves and all others
similarly situated,
Plaintiffs-Respondents.

Petition For A Writ Of Certiorari To The
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

This brief *amicus curiae* is filed by Westinghouse Electric Corporation (hereinafter "Westinghouse") with the consent of all parties,[1] as provided for in Rule 42 of the Rules of this Court.

1. Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

INTEREST OF WESTINGHOUSE ELECTRIC CORPORATION

Westinghouse is engaged in the manufacture of industrial electrical equipment, consumer electrical appliances, electronic equipment, electric motors, jet engines, as well as other electrical items and machinery.

Westinghouse is the defendant in various civil lawsuits presently pending in the United States District Court for the Western District of Pennsylvania in which issues have been raised which are very similar to those presented in the instant case. The complaints in those suits alleged, *inter alia,* that Westinghouse has discriminated, and is discriminating, on the basis of sex by maintaining sickness and accident plans which exclude pregnancy from their disability income protection coverage, in violation of Title VII of the Civil Rights Act of 1964, as amended[2] (hereinafter "Title VII"). Plaintiffs in those cases, on behalf of a nationwide class, are seeking, *inter alia,* an injunction requiring the elimination of the pregnancy exclusion from Westinghouse's sickness and accident insurance coverage, and monetary damages for many prior years.

---

2. 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e, *et seq.*

QUESTION PRESENTED

Whether the exclusion of pregnancy from disability income protection plans violates Title VII of the Civil Rights Act of 1964, as amended.

STATEMENT OF THE CASE

Amicus Westinghouse incorporates the Statement of the Case submitted by Petitioner in the Petition For Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I

The Petition For Certiorari Should Be Granted Because The Court Below Has Decided An Important Question Of Federal Law Which Has Not Been But Should Be Settled By This Court.

A. THE COURT BELOW HAS DECIDED A QUESTION OF FEDERAL STATUTORY INTERPRETATION WHICH HAS NATIONAL IMPLICATIONS.

The question of whether the exclusion of pregnancy from a disability income protection plan violates Title VII of the Civil Rights Act of 1964[3] affects employers, employees, labor organizations and insurance underwriters throughout the United States.

---

3. The Act provides in pertinent part as follows: "It shall be unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .; or

(2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex. . . ."

Title VII covers virtually all employers, both private and public throughout the United States.[4] Most of these employers employ women[5] and provide some form of payment to employees for absence from work due to non-occupational sickness or accident.[6] Thousands of union contracts are negotiated each year, almost all of which contain some provision for sickness and accident benefits.[7] Almost every employer in the United States either excludes absence due to pregnancy from sickness and accident benefit coverage or limits such

---

4. The Act initially covered "private" employers only, but in 1972 the Act was amended to extend coverage to state and local governments, governmental agencies, political subdivisions and departments and agencies of the District of Columbia as well. *See* Equal Employment Opportunity Act of 1972, 86 Stat. 103. To fall within coverage of Title VII, an employer need only to employ at least 15 persons.

5. In 1973, there were approximately 28 million women employees on nonagricultural payrolls in the United States. Waldman and McEaddy, *Where women work—an analysis by industry and occupation,* MONTHLY LABOR REVIEW, Vol. 97, May 1974, at 3, 6 (table 2).

6. A survey conducted principally by the Employment Standards Administration of the Department of Labor in early 1973 showed that approximately 64% of the nation's workers received "paid sick leave" as part of their overall fringe benefit program. Quinn, *et al., Evaluating working conditions in America,* MONTHLY LABOR REVIEW, Vol. 96, November 1973, at 32, 37.

7. *See e.g.,* U. S. Department of Labor, Bureau of Labor Statistics, Digest of 100 Selected Health Insurance Plans Under Collective Bargaining, Early 1966, Bull. No. 1502 (September 1966). Approximately 93% of workers under collective bargaining agreements were covered by negotiated health and insurance plans in 1972. *Research Summaries,* MONTHLY LABOR REVIEW, Vol. 98, January 1975, at 60, 68 (table 1).

coverage more strictly than coverage for sickness or accident.[8]

Disability benefit programs are designed to protect employees from the loss of income by providing the broadest coverage and maximum benefits available within the limit of a finite fund. The distribution of these benefits is determined by the employer either unilaterally, or through collective bargaining in those situations where a union exists. In creating a benefits program, the employer and/or union seek a balanced package of many benefits which best serve overall employee needs. Since no benefits package can satisfy all wants of all employees, the parties seek to utilize the benefits dollars in the most effective manner, keeping in mind the needs of all the employees.

This Court has recognized that the inclusion of maternity benefits in an insurance plan would greatly increase the overall cost of the Plan. *Geduldig v. Aiello,* 417 U.S. 484, 493-494 (1974). It has been estimated by at least one insurance actuary that the *annual* cost of adding coverage of pregnancy to short and long-term disability income plans currently in effect in the United States would be $1.35 billion.[9]

---

8. *See e.g.,* U. S. Department of Labor, Bureau of Labor Statistics, Digest of 100 Selected Health Insurance Plans Under Collective Bargaining, Early 1966, Bull. No. 1502 (September 1966).

9. *Gilbert v. General Electric Company,* 375 F.Supp. 367, 378 (E.D. Va. 1974), *appeal docketed,* No. 74-1557 (4th Cir. 1974). This figure did not allow for the possibility that the existence of the benefit might result in an increase in the frequency of pregnancy.

Although there has been disagreement over such cost estimates, it is inevitable that the increased cost of covering normal pregnancy will result in diminished quality and quantity of other aspects of insurance coverage or other benefits for millions of employees. The dimunition of other types of fringe benefits might also result.

Unless and until this Court determines that pregnancy coverage either need not be provided or must be provided, parties negotiating contracts or setting wage rates, insurance benefits, and other costs of employment will be unsure as to how much, if any, of the total package of economic benefits must be set aside to subsidize pregnancy.

In summary, the question of statutory interpretation decided by the Court below affects almost every employer in the nation, as well as literally millions of employees and the labor organizations which represent them. The question decided by the Court below is of such broad general importance that it should be reviewed by this Court.

B. THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW UPON WHICH THE COURTS HAVE DIFFERED.

The importance of the issue presented herein is further illustrated by the number of lawsuits involving this question which are presently pending in lower courts throughout this country.[10]

The United States District Court for the Northern District of Georgia has ruled, contrary to the instant case, that Title VII is not violated by the exclusion of pregnancy from disability income protection plans.[11]

In another recent decision, the United States Court of Appeals for the Second Circuit has reversed a determination by the Southern District of New York that this Court's *Aiello* decision controlled Title VII treatment of the pregnancy exclusion in disability income protection plans.[12] The Second Circuit held that *Aiello* did not preclude a finding that the exclusion of pregnancy from disability income protection plans violated Title VII. However, the Second Circuit expressly avoided discussion of the ultimate question—whether or not the exclusion of pregnancy is, as a matter of law, a violation of Title VII.[13]

10. *E.g., Eberts, et al. v. Westinghouse Electric Corporation,* C.A. No. 74-113 (W.D. Pa.; filed February 5, 1974); *Austerman, et al. v. Westinghouse Electric Corporation,* C.A. No. 75-229 (W.D. Pa.; filed February 21, 1975); *Communications Workers of America v. Illinois Bell,* 73-C-959 (N.D. Ill.; filed April 13, 1973); *Communications Workers of America v. Southern Bell Tel. & Tel.,* No. 18328 (N.D. Ga.; filed May 17, 1973); *Communications Workers of America v. The Pacific Tel. & Tel. Co.,* C.A. No. C-73-1739 RFP (N.D. Cal.; filed September 28, 1973); *Communications Workers of America v. South Central Bell Tel. Co.,* C.A. No. 73-1771 Section A (E.D. La.; filed July 5, 1973); *Grogg v. General Motors Corporation,* No. 73 Civ. 63 (S.D. N.Y.; filed January 4, 1973).

11. *Newmon v. Delta Airlines, Inc.,* 374 F.Supp. 238 (N.D. Ga. 1973).

Every day that passes without a final and definitive decision by this Court gives rise to thousands of new claims and potential lawsuits.

Resolution of the lawsuits which are presently pending is likewise delayed in anticipation of guidance from this Court.

Widespread litigation on this important federal question will continue until the issue is settled by this Court.

II

The Petition For Certiorari Should Be Granted Because The Decision Of The Court Below Is Inconsistent With This Court's Decision in Geduldig v. Aiello And Is Otherwise Erroneous.

The Court of Appeals held, *inter alia,* that Liberty Mutual's income protection plan violates Title VII "by

12. *Communications Workers of America v. American Telephone and Telegraph Company,* No. 74-2191, 2d Cir., March 26, 1975, *reversing* 379 F. Supp. 679 (S.D. N.Y. 1974).

13. The Second Circuit noted that, unlike *Aiello,* the record before it was bare of evidence regarding "the nature, details, operations and effect" of the plan or "the reasons for its enactment." Accordingly, the Second Circuit remanded for development of a record by the trial court.

excluding pregnancy benefits from coverage while including other kinds of temporary disabilities."[14] The Court below explained that although Liberty Mutual's plan is neutral on its face, it "treats a protected class of persons in a disparate manner."[15]

The decision of the Court of Appeals is inconsistent with the decision of this Court in *Geduldig v. Aiello,* 417 U.S. 484 (1974).

The *Aiello* case involved a challenge to the constitutionality of the disability insurance system of the State of California under which benefits were paid to persons in private employment who were temporarily unable to work because of disability not covered by workmen's compensation. The California plan excluded from coverage disabilities that were attributable to pregnancy. The District Court held that the exclusion of such disabilities violated the Equal Protection Clause of the Fourteenth Amendment.

This Court reversed, holding that the "pregnancy exclusion" did not constitute sex discrimination in violation of the Equal Protection Clause. This Court stated that:

> "There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.[20] There is no risk from which men are protected and

14. *Wetzel and Ross v. Liberty Mutual Insurance Company,* ..... F. 2d ....., No. 74-1233, 3d Cir., February 11, 1975, Appendix to Petition for Writ of Certiorari at A14.

15. *Id.*

> women are not. Likewise, there is no risk from which women are protected and men are not."
>
> [Footnote 20 is that of the Court.][16]

In footnote twenty to the *Aiello* opinion this Court explained its holding that the exclusion was not sex discrimination:

> "The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes."[17]

In the instant case, the Third Circuit dismissed the applicability of *Aiello* on the grounds that *Aiello* was a case of constitutional analysis wherein deference was shown to the legislative judgment of the State of California in balancing public social welfare interests with the Constitution.

It is true that a portion of the *Aiello* decision was devoted to a consideration of the significant economic costs that justified the decision of the California legislature to exclude certain disabilities related to pregnancy. However, the Third Circuit failed to recognize that the conclusion of this Court that the California plan did not involve sex discrimination was central to the Court's conclusion that the Equal Protection Clause was not violated.

The Third Circuit held that the exclusion of maternity benefits from the Liberty Mutual income protection plan violates the Act because the plan treats a protected class of persons in a disparate manner. This

16. *Aiello, supra,* 417 U.S. at 496-497.

17. *Aiello, supra,* 417 U.S. at 497.

holding could have been reached only if (a) the Court below failed to accept the *Aiello* classifications quoted above or (b) the Court below, while accepting the *Aiello* classifications, nevertheless determined that a class of "pregnant women" may not be treated differentially under the Act than "non-pregnant persons."

Both lines of reasoning are erroneous.

First, the Third Circuit erred if it failed to apply the *Aiello* classifications. This Court's determinations in *Aiello* of the relevant classifications resulting from exclusion of pregnancy and whether or not those classifications discriminate on the basis of sex are, in themselves, legal principles which are not dependent upon any economic analysis or legislative deference. These *Aiello* principles are therefore applicable to statutory interpretation as well as constitutional analysis.

Second, assuming the Third Circuit accepted the *Aiello* classifications, it erroneously concluded that a class of pregnant women is "protected" under the Act and therefore may not be treated differently from other employees. Title VII prohibits discrimination on the basis of *sex*. This Court explicitly held, in *Aiello,* that "pregnant women" and "non-pregnant persons" are not sex-based classifications.[18]

Our interpretation of this Court's decision in *Aiello* is consistent with prior decisions of this Court.

---

18. *Aiello, supra,* 417 U.S. at 496, n. 20 ("While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . .").

In *Frontiero v. Richardson*[19] and *Reed v. Reed*[20] this Court did not deal with the question of "pregnant persons." Those cases both involved discrimination based upon gender, as such, and were expressly distinguished on this basis by this Court in *Aiello.*

Similarly, in *Phillips v. Martin Marietta Corp.,*[21] the alleged discrimination was based solely on sex in that females with pre-school age children were subject to different hiring policies than men with pre-school children. Unlike pregnancy, the condition on which the alleged discriminatory action was based in *Martin Marietta, i.e.,* having pre-school children, was a condition which can and does occur among both males and females.

This Court's decision in *Cleveland Board of Education v. LaFleur,*[22] which involved a mandatory leave policy for pregnant teachers, is also clearly reconcilable with *Aiello.* First, this Court in *LaFleur* did not hold that the maternity leave regulations were sexually discriminatory within the meaning of the Equal Protection Clause of the 14th Amendment. Rather, this Court held that the Due Process Clause of the 14th Amendment prohibited the state government, through the school system, from depriving a teacher of her job upon the basis of arbitrary unwarranted presumptions as to how long a pregnant person can work. Second, the restrictive maternity leave policies in *LaFleur* involved no legitimate cost variables to the employer to justify the with-

---

19. 411 U.S. 677 (1973).
20. 404 U.S. 71 (1971).
21. 400 U.S. 542 (1971).
22. 414 U.S. 632 (1974).

holding or termination of a job, whereas the conveyance of disability benefits is extremely costly.[23]

Our view of the proper interpretation of this Court's decision in *Aiello* is supported by the legislative history of the proposed Equal Rights Amendment to the United States Constitution ("ERA")[24] which indicates that Congress has disavowed the position that an employment policy or practice constitutes sex discrimination merely because it is based upon a sex-related physical characteristic.

For example, the most vigorous supporters of the Equal Rights Amendment agreed that the ERA would not prohibit reasonable classifications based on physical characteristics that are unique to one sex.[25] So long as a characteristic is found in all women and no men, or all men and no women, a law or covered employment practice predicated upon such characteristics would not violate the ERA for it would raise no problem of ignoring individual characteristics in favor of prevailing

---

23. *See Brief, supra* at 6.

24. The ERA requires that:

"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

The House approved the ERA by a vote of 354-23. H. J. Res. 208, 92d Cong., 1st Sess., 117 Cong. Rec. H 9392 (daily ed. Oct. 12, 1971). The Senate approved it by a vote of 84-8. S. J. Res. 122, 92d Cong., 2d Sess., 118 Cong. Rec. S 4612 (daily ed. March 22, 1972). The Amendment has now been submitted to the states for ratification.

25. *See e.g.,* Hearings Before Subcomm. 4 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. 40 (1971) (hereinafter cited as ERA House Hearings) (testimony of Congresswoman Martha Griffiths); *Id.* at

(footnote continued on following page)

group characteristics or an average. Under this principle, supporters of the ERA repeatedly cited maternity legislation and laws governing childbearing and pregnancy as typical of "state action" which would not be affected by the ERA.[26]

In view of the failure of the ERA to treat a matter such as that involved in this case as sexually discriminatory, it would be anomalous in the extreme to regard it as sex discrimination under Title VII. The legislative history of the ERA in this respect should be viewed as the controlling substitute for the comparatively barren legislative history of Title VII on sex discrimination.

In summary, the Court of Appeals misconstrued this Court's opinion in *Aiello* and erroneously concluded that the employment practice herein constitutes sex discrimination as proscribed by Title VII.

It is important to keep in mind that the grant or denial of income protection for pregnancy does *not* involve an equalization of employment opportunities for women. Women have attained equal employment opportunities when they are permitted to take a leave of absence during pregnancy and the immediate post-delivery period.

(footnote continued from preceding page)

116 (testimony of Congresswoman Bella Abzug); 117 Cong. Rec. H 9368 (daily ed. Oct. 12, 1971) (remarks of Congressman Ryan).

26. *See e.g.,* ERA House Hearings at 402 (testimony of Professor Thomas I. Emerson, Lines Professor of Law at The Yale Law School); Hearings on S. J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Judiciary Comm., 91st Cong., 2d Sess. 493 (1970) (testimony of Betty Friedan, founder of the National Organization for Women).

Instead, the issue here is whether employers will be required to subsidize the cost to a family of the bearing of children. We submit that it would be a gross distortion of Title VII to impose the cost of child bearing upon all employers and employees through the guise of eliminating sex discrimination.

CONCLUSION

For the reasons set forth above, this Court should grant Liberty Mutual's Petition for a Writ of Certiorari to review the Third Circuit's decision. The issues presented by the instant case are of general importance to the nation and must be finally resolved by this Court.

Respectfully submitted,

JOHN G. WAYMAN
SCOTT F. ZIMMERMAN
WALTER P. DEFOREST
MARTHA H. MUNSCH

REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

Counsel for *Amicus Curiae,*
Westinghouse Electric Corporation

Of Counsel:

RONALD G. INGHAM
Westinghouse Electric Corp.
Gateway Center
Pittsburgh, Pennsylvania 15222

Dated: April 4, 1975

Supreme Court, U. S.
FILED
APR 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL, AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

GERARD C. SMETANA,
JERRY KRONENBERG,
JULIAN D. SCHREIBER,
BOROVSKY, SMETANA, EHRLICH & KRONENBERG,
2011 Eye Street, N.W.,
Suite 800,
Washington, D. C. 20006,
Attorneys for the Amicus Curiae.

MILTON A. SMITH,
General Counsel,

RICHARD B. BERMAN,
Labor Relations Counsel,
Chamber of Commerce of the United States of America,
1615 H Street, N.W.,
Washington, D. C.,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • 346-1717

TABLE OF CONTENTS.

PAGE

Interest of the Amicus Curiae 1

Summary of Argument 3

Argument 5

The Exclusion of Pregnancy Benefits from an Insurance Program Does Not Inherently Constitute Proscribed Sex Discrimination 5

A. The Exclusion of Pregnancy Benefits Does Not Affect Women in an Area Where They Are Similarly Situated with Men 5

B. Pregnancy Just as Any Other Physical Disability May Be Excluded from Insurance Coverage on Any Reasonable Basis 8

C. The EEOC's Sex Discrimination Guidelines Are Invalid and Are Entitled to No Weight 14

1. *Aiello* Repudiated These Guidelines 14

2. Independent Considerations Demonstrate These Guidelines Are Invalid 15

a. The Commission's Sex Discrimination Guideline Was Not a Contemporaneous Construction of Title VII, and It Has Not Been Applied Consistently for a Long Period of Time 15

b. The Sex Discrimination Guideline Was Not Issued with the Evident Thoughtfulness That Marks Agency Expertise 18

Conclusion 21

Appendix A A1

Table of Authorities Cited.

Cases.

Boy's Markets v. Retail Clerks Union, 398 U. S. 235 (1970) 2

Cleveland Board of Education v. LaFleur, 414 U. S. 632, F. E. P. Cases 1253 (January 21, 1974) 10

Communications Workers of America v. A. T. & T. Co. Long Lines Department, ... F. 2d ..... (CA 2, March, 1975) 7

Connell Construction Company, Inc. v. Plumbers and Steamfitters Local Union No. 100, etc., No. 73-1256 .. 2

Contractors Ass'n. of Eastern Pa. v. Secretary of Labor, 442 F. 2d 159 (CA 3), *cert. den.*, 404 U. S. 854 (1971) 9

Dewey v. Reynolds Metal Co., 429 F. 2d 324 (CA 5, 1970) 7

Espinoza v. Fara Mfg. Co., 414 U. S. 86 (1973) 4, 15, 19

Geduldig v. Aiello, et al., 417 U. S. 484 (1974) .....*passim*

Griggs v. Duke Power Co., 401 U. S. 424 (1971) .....*passim*

Jefferson v. Hackney, 406 U. S. 535 (1972) 11

Jones v. Lee Way Motor Freight, Inc., 431 F. 2d 245 (CA 10, 1970) 9

Middleton Board of Education, 56 LA 830 (1971) 20

N. L. R. B. v. Boeing Co., 412 U. S. 16 (1973) 18

National Lead Co., 18 LA 528 (1952) 20

Newman v. Delta Air Lines, 374 F. Supp. 238, 7 F. E. P. Cases 26 (N. D. Ga., 1973) 13, 18, 19

Norwalk Redevelopment Agency, 395 F. 2d 920 (CA 2, 1968) 9

Papermakers Local 189 v. United States, 416 F. 2d 980 (CA 5, 1969), *cert. den.*, 397 U. S. 919 (1970) 10, 13

Phillips v. Martin Marietta Corp., 400 U. S. 542 (1971) 3, 7

H. K. Porter Co. v. N. L. R. B., 397 U. S. 99 (1970) 2

Republic Steel Corp., 37 LA 267 (1961) 20

Robinson v. Lorillard Corporation, 444 F. 2d 791 (CA 4, 1971) 17

Sears Roebuck and Co. v. Carpet Layers, Local 419, 397 U. S. 655 (1970) 2

Skidmore, et al. v. Swift and Co., 323 U. S. 134 (1944) .. 15

Super Tire Engineering Co., et al. v. McCorkle, et al., ... U. S. ....., 85 LRRM 2913 (April, 1974) 2

Williams v. New Orleans Steamship Assn., 341 F. Supp. 613 (E. D. La., 1972) 18

Statutes.

Civil Rights Act of 1964—Title VII
42 U. S. C. §§ 2000e to 2000e-15 .....*passim*

Miscellaneous.

CCH Employment Practices 12-21-66, paragraph 17,304.43 16

CCH, New Developments, Paragraph 8804, EEOC Attorney Discusses Sex Discrimination and Fringe Benefits Under Title VII, 1964 Civil Rights Act 17

Davis, *Administrative Law Text*, Section 5.03 (1959) ... 15

General Counsel's Opinion Letter, November 15, 1966 ... 16

10 Cong. Rec. 2527 (1964) 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL, AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

INTEREST OF THE AMICUS CURIAE.*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000) and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' view on questions of im-

* Consents of all parties for the participation of the *amicus* have been filed with this Court.

portance to their vital interests and to render such assistance as it can to the Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court and has participated as an *amicus* in the court below. *E.g., Geduldig* v. *Aiello, et al.*, 417 U. S. 484 (1974); *Griggs* v. *Duke Power Company*, 401 U. S. 424 (1971); *Connel Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100, etc.*, No. 73-1256; *Boy's Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99 (1970); *Sears Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U. S. 655 (1970); *Super Tire Engineering Co., et al* v. *McCorkle, et al.*, ... U. S. ....., 85 LRRM 2913 (April, 1974).

There are issues in this case that are of major importance to the Chamber's members: whether an employer may exclude maternity and related conditions from his disability program without being guilty of illegal sex discrimination under Title VII of the Civil Rights Act of 1964, (42 U. S. C. Sections 2000e to 2000e-15) and what deference is due to the Equal Employment Opportunity Commission's new maternity guidelines. These issues are matters of national concern because most employers have maternity benefit policies, and most employers come within the provisions of Title VII of the Civil Rights Act. Further, the collective bargaining agreements of a substantial number of these employers contain provisions concerning the payment of fringe benefits. The Chamber is, thus, vitally concerned that these questions be properly resolved.

The issues presented here are, as well, issues of first impression. Because of its broad representation of employers, the Chamber is in a position to present arguments to this Court which might not otherwise be advanced by the parties.

Indeed, as stated, the Chamber participated as an *amicus curiae* in *Geduldig* v. *Aiello, supra*, before this Court, and it appears from reading this Court's *Aiello* opinion that the Chamber's arguments were carefully and favorably considered.

SUMMARY OF ARGUMENT.

The crucial issue here is whether an employer may exclude maternity and related conditions from his disability program without being guilty of illegal sex discrimination under Title VII. This issue has been propelled into national prominence not only by the expanded coverage of Title VII and the fact that most employers have illness or benefit plans, but also due to this Court's recent decision in *Geduldig* v. *Aiello, supra.*

The *amicus* submits that the *Aiello* analysis is apposite to and dispositive of the issues presented here since it is logically sound to find that interdicted discrimination because of sex can exist under Title VII only when it occurs under the Fourteenth Amendment. Indeed, a comparison of *Aiello* and this Court's decision in *Phillips* v. *Martin-Marietta Corp.*, 400 U. S. 542 (1971) demonstrates that the variables employed to determine whether proscribed sex discrimination exists are identical whether the Fourteenth Amendment or Title VII is involved. Under these decisions, there can be no prohibited sex discrimination unless men and women, otherwise similarly circumstanced, are unequally treated solely because of sex. That is, unequal treatment between different categories of the same sex is not interdicted discrimination because of sex. Following *Aiello's* rationale, the terms of an insurance program which exclude pregnancy alone from a list of compensable disabilities do not constitute interdicted sex discrimination since benefits nonetheless accrue to members of both sexes with no exclusion from benefit eligibility because of gender. That is, whatever unequal treatment may exist in such an insurance program occurs between different categories of the same sex; there is no risk from which men are protected and women are not.

Furthermore, it is submitted, consonant again with *Aiello's* rationale, that where the exclusion of pregnancy benefits is the

result of a rationally based conscious choice to afford benefits to men and women that would otherwise be unavailable at a minimum cost, this exclusion cannot violate Title VII, unless independent evidence demonstrates that the denial of pregnancy coverage is a pretext intended to accomplish proscribed discrimination.

In addition to the foregoing, this case presents an issue that permeates many Title VII cases: under what circumstances should courts defer to the Equal Employment Opportunity Commission's guidelines. There is need for this Court to again address this issue since many courts have failed to adhere to the teaching of *Griggs* and *Espinoza*[1] that the Commission's guidelines are entitled to weight only if the conclusion is inescapable that they comport with Congressional intent. When this standard is applied, the guideline involved in the instant cause (Section 1604.10, adopted 1972), is entitled to no weight, and therefore the court below erred in deferring to the Commission's view of Title VII.

Accordingly, the Petition presents issues of national importance affecting virtually all employers covered by Title VII.

1. *Griggs* v. *Duke Power*, 401 U. S. 424 (1971); *Espinoza* v. *Farah Mfg. Co.*, 414 U. S. 86 (1973).

ARGUMENT.

THE EXCLUSION OF PREGNANCY BENEFITS FROM AN INSURANCE PROGRAM DOES NOT INHERENTLY CONSTITUTE PROSCRIBED SEX DISCRIMINATION.

The Chamber contends that an employer should not be required by Title VII to provide benefits for pregnancy on the same terms as he provides benefits for illness or injury. Furthermore, the Chamber urges that the EEOC's guideline containing this requirement is invalid and entitled to no weight by this Court.

The *amicus* draws cogent support for his position from this Court's decision in *Geduldig* v. *Aiello, supra*. There, this Court held that a state disability insurance program may exclude from coverage disability caused by normal pregnancy and childbirth without violating the Equal Protection Clause of the Fourteenth Amendment. The Chamber asserts that the *Aiello* Court's analysis is apposite to and dispositive of similar issues arising under Title VII.

A. The Exclusion of Pregnancy Benefits Does Not Affect Women in an Area Where They Are Similarly Situated With Men.

As this Court in *Aiello* recognized explicitly there can be no prohibited sex discrimination unless men and women, otherwise similarly situated are unequally treated solely because of sex. That is, unequal treatment between different categories of the same sex is not proscribed discrimination because of sex. It necessarily follows, as the *Aiello* Court held, that excluding pregnancy from a benefit plan is not interdicted sex discrimination inasmuch as this exclusion does not affect women in an area where they are similarly circumstanced with men. In reach-

ing this conclusion, this Court expressly rejected the position urged by the dissenters in *Aiello*. Thus, fundamental to the dissenters' position was the premise that the exclusion of a gender-related disability, such as pregnancy, *per se* amounted to proscribed sex discrimination.[2] In repudiating this view, the *Aiello* Court held instead that California's benefit plan did not violate the Fourteenth Amendment, though pregnancy was excluded, since under the plan ". . . there is no risk from which men are protected and women are not." (417 U. S. at 496-497)

There is nothing in *Aiello* that suggests that this Court's analysis of what may in fact constitute prohibited sex discrimination is inapplicable when Title VII, rather than the Fourteenth Amendment, is involved. On the contrary, the observations in *Aiello* endorse the Chamber's view that proscribed sex discrimination under Title VII can occur only in those circumstances where it would arise under the Fourteenth Amendment. Thus, in *Aiello* this Court recognized that the terms of an insurance program which excluded pregnancy alone from the list of compensable disabilities did not constitute interdicted sex discrimination since benefits nonetheless accrued to members of both sexes with no exclusion from benefit eligibility because of gender. (at 496-497, n. 20) That is, whatever unequal treatment existed occurred between different categories of the same sex; there was no risk from which men were protected and women were not. *Aiello* did not restrict these observations to plans funded by a state. Moreover, it is apparent that the conclusions concerning the legitimacy of California's insurance program reasonably apply with equal vitality when private benefit programs which exclude only pregnancy from compensable disabilities are examined to determine whether or not prohibited sex discrimination exists. That is, since the question is first one of *fact*, it is logically sound to find that interdicted discrimination be-

2. The dissenters stated ". . . dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination." (417 U. S. at 501)

cause of sex can exist under Title VII only when it occurs under the Fourteenth Amendment.

Consequently, the attempt by the court below and the Second Circuit[3] to distinguish *Aiello because* that case did not involve private insurance plans and Title VII must fail. To simply state this difference does not demonstrate any reason to hold *Aiello's* analysis of insurance plans inapplicable to Title VII cases, and neither the decision below nor that of the Second Circuit has offered such a demonstration.

Following the rationale of *Aiello*, then, whether the validity of a pregnancy exclusion is contested under Title VII or the Fourteenth Amendment, rules concerning benefits relating to pregnancy do not affect women in an area where they are similarly circumstanced with men. Accordingly, deprivation of maternity benefits does not *per se* constitute proscribed dissimilar treatment for men and women who are similarly situated whether Title VII or the Fourteenth Amendment is involved.[4]

3. *Communication Workers of America* v. *A. T. & T. Co. Long Lines Department*, ... F. 2d ..... (CA 2, March, 1975).

4. A comparison of this Court's *Aiello* and *Phillips* v. *Martin Marietta Corp.* (400 U. S. 542, 1971) decisions demonstrates that the variables employed to determine whether proscribed sex discrimination exists are identical whether Amendment Fourteen or Title VII is involved. Thus, as stated, *Aiello* recognized that there can be no prohibited sex discrimination unless men and women, otherwise similarly situated, are unequally treated solely because of sex. Similarly, *Martin* held that under Title VII there can be no proscribed sex discrimination unless men and women who are otherwise equally qualified for the same job are treated unequally solely because of sex: "Section 703 (a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex."

Furthermore, had Congress intended to enlarge the area of sex discrimination to embrace areas where men and women were not similarly circumstanced, it would have specifically done this following the *Martin* decision and expressly rejected the rationale of that decision. Congress has done this in the past when it reacted to the *Dewey* v. *Reynolds Metal Co.* (429 F. 2d 324 (CA 5, 1970)) decision by amending in 1972 the Civil Rights Act of 1964 to reflect a view contrary to that expressed by that court, and to require employers to adjust their schedules to accommodate the religious practices of their

B. Pregnancy, Just as Any Other Physical Disability, May Be Excluded from Insurance Coverage on Any Reasonable Basis.

In addition to holding the California plan valid for reasons set forth in part A of this brief, this Court in *Aiello* found that when an insurer advances a reasonable basis for excluding a physical disability from coverage, this exclusion is not inherently interdicted sex discrimination even though the excluded condition affects only one sex. In reaching this conclusion, this Court has recognized that the insurer has a reasonable and legitimate interest in utilizing available benefit funds effectively and in maintaining contribution rates at a level that will not burden those who require insurance coverage.[5] Thus this Court observed that where the inclusion of pregnancy and maternity benefits will result in increased premiums or decreased benefit payments for other covered disabilities, the exclusion of pregnancy cannot automatically be attributed to proscribed sex discrimination.

As this Court explained in *Aiello*:

> "While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra,* and *Frontiero, supra.* Normal pregnancy is an objectively identifiable physical condition with unique characteristics. *Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of*

employees. Congressional silence at a time when amendments to the Civil Rights Act where under consideration must be taken as demonstrating Congress' approval of this Court's rationale in *Martin.*

5. This Court has stated in its *Aiello* decision: "The State has a legitimate interest in maintaining the self-supporting nature of its insurance program. Similarly, it has an interest in distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately. Finally, California has a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of the disability insurance." 417 U. S. at 496

> *one sex or the other, law-makers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.*" at 496, note 20. (emphasis added).

The Chamber believes that this aspect of *Aiello,* like that discussed in part A, *supra,* is equally apposite to the similar issues arising under Title VII in this case. In *Aiello,* the Court upheld the exclusion of pregnancy since this exclusion was rationally related to the State's legitimate cost saving interests in maintaining an efficient insurance program. There is no logical reason to subject private insurers to a more stringent test when the legality of an exclusion of pregnancy related disabilities is at issue. Rather, since both the Fourteenth Amendment and Title VII represent interdictions against discrimination, the test to determine whether these proscriptions have been violated should be identical absent an explicit expression from this Court manifesting a contrary intent. Such an enunciation is absent here.

Futhermore, inasmuch as the objective of both state and private insurers is to construct a comprehensive benefit program at a minimal cost, it follows that the test of legitimacy also should be equivalent whether the Fourteenth Amendment or Title VII is involved.[6] To read *Aiello* as not applying to private

6. There can be no doubt that the development of the equal employment opportunity law under Title VII of the Civil Rights Act of 1964 has been significantly affected by concepts first enunciated in equal protection cases involving education, voting or other civil rights. *See e.g., Griggs* v. *Duke Power Co.,* 401 U. S. 424 (1971) (citing *Gatson County* v. *United States,* 395 U. S. 285 (1969), re-educational disadvantage and voting standards); *Contractors Ass'n of Eastern Pa.* v. *Secretary of Labor,* 442 F. 2d 159 (CA 3), *cert. denied,* 404 U. S. 854 (1971) (citing *Porcelli* v. *Titus,* 302 F. Supp. 726 (D. N. J. 1969), *aff'd.,* 431 F. 2d 1254 (CA 3, 1970), *cert. denied,* 402 U. S. 944 (1971), and *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F. 2d 920 (CA 2, 1968) re the appropriateness of color conscious remedial action in public school employment and in public housing matters); *Jones* v. *Lee Way Motor Freight, Inc.,* 431 F. 2d 245 (CA 10, 1970), *cert. denied,* 401 U. S. 954 (1971) (citing *Alabama* v. *United States;* 304 F. 2d

insurers would produce the anomaly where a state, possessing manifold resources from which to obtain funds, nevertheless would be permitted to exclude pregnancy from its benefit program as too costly, while a private insurer lacking such resorts could be required to endure the exorbitant cost of coverage or to terminate utterly his benefit program.[7]

It is, therefore, overly simplistic to conclude that by excluding a condition occurring only to one sex from his benefit program, an employer without more unlawfully discriminates against that sex. Rather following the rationale underpinning the *Aiello* decision, where the exclusion of pregnancy is the result of a *rationally based conscious choice* to afford benefits to men and women that would otherwise be unavailable at a minimum cost, this exclusion cannot violate Title VII, unless independent evidence demonstrates that the denial of pregnancy coverage is a pretext intended to accomplish proscribed discrimination.

The *Aiello* rationale is in harmony with previous decisions of this Court. That is, on analysis, *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), while frequently cited by plaintiffs in Title VII

583 (CA 5), *aff'd. mem.*, 371 U. S. 37 (1962), re the significance of statistical evidence showing that blacks had not served on juries in areas in which blacks constituted a substantial part of the population); *Papermakers Local 189* v. *United States*, 416 F. 2d 980 (CA 5, 1969), *cert. denied*, 397 U. S. 919 (1970) (citing *Louisiana* v. *United States*, 380 U. S. 145 (1965), and other cases, re facially neutral standards in voting registration as perpetuating past discrimination). Thus, the constitutional and statutory precedents have been basically merged. Now that Title VII has been made applicable to the employment practices of state and local governments by the Equal Employment Opportunity Act of 1972, the need for consistency in the principles applicable to public and private employers is even more apparent. *See Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 6 F. E. P. Cases 1253, 1256 n. 8 (January 21, 1974).

7. In California, it appears that approximately 10% of the disability insurance there written is administered by private employers. These employers are required by California law to provide benefits identical to or greater than those provided by the state. Unless *Aiello* applies to private insurers, the state will be permitted to exclude pregnancy from its plan while a private insurer who models his plan after the state's may be denied this right. Such a result would be grossly inequitable.

proceedings, is in accord with the *Aiello* decision and with the positions herein asserted. There, in *Griggs*, the employer required as a condition of employment that applicants have a high school education or that they pass a standardized general intelligence test. These requirements operated to disqualify Blacks at a substantially higher rate than white applicants. Because these requirements were not shown to be related to the successful performance of the job for which the applicants were being considered, this Court held that the employer violated Title VII by maintaining these requirements, even though the employer did not intend to discriminate against Blacks. This Court stated that, "If an employer practice which operates to exclude Blacks cannot be shown to be related to job performance, the practice is prohibited." (at 431.)

While this Court in *Griggs* found that the requirements *were unrelated to measuring job performance, and, therefore, discriminatory*, this Court stated that nothing in the Act prevents an employer from using tests which relate to job performance, and employers may require applicants to be fit for the job. In *Jefferson* v. *Hackney*,[8] this Court amplified and interpreted this aspect of *Griggs*. This Court stated, at 549:

> "We have, however, upheld the findings of nondiscriminatory purpose in the percentage reductions used by Texas, and have concluded that the variation in percentages is

8. 406 U. S. 535 (1972). *Jefferson* involved a state's determination to allocate a fixed pool of welfare money by paying AFDC benefits at 75% of need while paying other insurance programs at a higher percentage, e.g., old age assistanse at 100% of need and aid to blind at 95% of need. AFDC recipients challenged this determination by alleging racial discrimination, since the proportion of AFDC recipients who were black or Mexican-American was higher than the proportion of aged, blind or disabled welfare recipients who fell within these minority groups. This Court found no invidious discrimination under the Fourteenth Amendment and said racial discrimination was not proven. This Court did not substitute its judgment for the State's determination on how best to allocate the welfare money, even though different policy judgments were possible, because the State's conclusion that the aged and infirm were less able to bear the hardships of an inadequate living standard than were the young AFDC recipients was reasonable.

> *rationally related* to the purpose of the separate welfare programs. The Court's decision in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), is therefore inapposite. In *Griggs*, the employment tests having racially discriminatory effects were found not to be job related, and *for that reason were impermissible under the specific language of Title VII of the Civil Rights Act*. Since the Texas procedure challenged here *is related* to the purposes of the welfare program, it *is not* proscribed by Title VI simply because of the variances in the racial composition of different categorical programs." (Emphasis supplied.)

In both *Griggs* and *Jefferson* the challenged procedures had racially discriminatory effects. The job testing procedure in *Griggs* violated Title VII because it was not related to job performance. In *Jefferson* the differences in benefit payments did not violate Title VI because it could be reasonably said that these differences in payment were related to the the legitimate purposes of the welfare program.[9] *Griggs, Jefferson* and *Aiello* have an apparent consistency: when conduct challenged as discriminatory has a demonstrated relationship to legitimate goals, it will not automatically be found to have violated the Constitution or equal opportunity statutes.

Here, just as in *Aiello,* the pregnancy exclusion is related to the legitimate design of the insurance program. Thus, it must be kept in mind that when an employer has only a finite amount of money to expend on coverage for employees of both sexes, he must be accorded the right to determine how to utilize those funds most effectively for the benefit of all. Exclusions based

9. In *Jefferson,* a Title VI case, this Court utilized a test virtually identical to that employed in *Griggs* involving Title VII to determine the legitimacy of challenged conduct. The logic of this consistency is evident since whether challenged conduct is related to legitimate objectives is a question of fact, and therefore it is reasonable to employ the identical criteria to resolve this question whether Title VI or VII is involved. Similarly, the question of whether employer conduct amounts to proscribed sex discrimination is first one of fact. Accordingly, it is logically sound to find that prohibited sex discrimination under Title VII can occur only in those circumstances where it would arise under Amendment Fourteen.

solely on the variables of cost and comprehensiveness of coverage should not rationally and automaticelly be attributed to prohibited sex discrimination. Rather, consistent with the rationale of *Aiello,* where there is a *reasonable basis* to exclude maternity benefits from benefit programs, the exclusion cannot violate Title VII unless unlawful motive is demonstrated by independent and unequivocal evidence.[10]

Furthermore, while *Griggs* required that employers justify their challenged conduct by showing business necessity, that standard should not be applied in this case. In the first place, *Griggs* involved discrimination between *different* races; in the area of maternity fringe benefits the sexes are not similarly situated and, as *Aiello* held, and Part A of this brief contends, a policy excluding maternity benefits does not, therefore, constitute illegal sex discrimination. Second, the effect of the employment requirements in *Griggs* was to deny a large segment of the population of a North Carolina county employment opportunities. These requirements caused discrimination and had a pervasive effect against virtually the entire black population of that county because they did not have the educational background to meet the employer's requirements. Here, just as in *Aiello,* the exclusion from benefit programs of maternity benefits adversely affects only a portion of one sex some of the time while at the same time having a salutary effect on members of that sex generally as well as on all other employees. Just as in *Aiello* and unlike *Griggs,* the exclusion here is the result of a conscious choice to reduce the plan's costs and therefore to afford other benefits to both women and men which would be otherwise unavailable. Indeed, the cost increase to employers occasioned by the addition of disability income benefits to cover pregnancy is of such dramatic consequence that exclusion of these benefits

10. *Local 189 United Paper Makers and Paper Workers* v. *United States,* 416 F. 2d 980, 992 (CA 5, 1969) quoted in *Newmon* v. *Delta Air Lines,* 374 F. Supp. 238, 7 F. E. P. Cases 26 (N. D. Ga. 1973). "[W]hen the defendant's conduct evidences an economic purpose there is no discrimination under Title VII . . ."

logically cannot be equated with unlawful discrimination unless unlawful motive is clearly shown.[11]

C. The EEOC's Sex Discrimination Guidelines Are Invalid and Are Entitled to No Weight.

1. Aiello Repudiated These Guidelines.

This Court's opinion in *Aiello* indicates that it will not uphold the EEOC's guidelines that mechanically equate differential treatment of pregnancy with statutorily proscribed sex discrimination.[12] Thus, the *Aiello* dissent expressly relied upon these guidelines to support *its* contention that the mere exclusion of disabilities inextricably linked to one sex inevitably constitutes sex discrimination. As stated, the majority rejected this argument and instead found that the exclusion of pregnancy cannot *per se* constitute proscribed sex discrimination, since this exclusion does not affect women in an area where they are similarly circumstanced with men. This finding, applicable to cases arising under Title VII as well as those under the Fourteenth Amendment, in and of itself demonstrates that this Court has repudiated the EEOC's pregnancy guidelines.

Furthermore, the *Aiello* Court observed that the exclusion of pregnancy fostered the State's legitimate interest in establishing a benefit program that would function in accordance with insurance concepts and in maintaining the fiscal integrity of this program. It is transparent from reading the EEOC's guidelines relevant to this case, that *they* do not permit an evaluation of an insurer's reasons for excluding pregnancy from a benefit plan. Thus, in finding that distinctions involving pregnancy do not constitute proscribed sex discrimination and that an insurer's reasons for excluding pregnancy are a relevant considera-

11. The *amicus* has provided relevant examples of the cost factor in Appendix A of this brief.

12. Section 1604.10, effective April 5, 1972.

tion in determining the legitimacy of this exclusion, *Aiello* has unequivocally repudiated these guidelines.[13]

2. Independent Considerations Demonstrate These Guidelines Are Invalid.

There are additional reasons wholly apart from those considered by the *Aiello* court that establish the invalidity of the pregnancy guidelines. Thus, the guideline is inconsistent with prior opinions, was not issued when Title VII was enacted, and demonstrates none of the thoughtfulness commonly associated with agency expertise.[14]

a. *The Commission's Sex Discrimination Guideline Was Not a Contemporaneous Construction of Title VII, and It Has Not Been Applied Consistently for a Long Period of Time.*

A brief odyssey through the Commission's pronouncements on fringe benefits and pregnancy is necessary to fully appreciate the explicit inconsistency of the Commission's position.

Between 1966, shortly after Title VII became effective,[15] and 1969 the Commission issued a number of opinions announcing how it would apply Title VII when encountering the issue of fringe benefits and pregnancy. These opinions reveal a consistency of approach to this issue and generally informed employers

13. As urged, there is nothing in *Aiello* to suggest that an insurer's reasons for excluding pregnancy will be evaluated *only* when a *governmental* benefit plan is involved. Rather, this Court's reference to "insurance concepts" signifies that this Court will consider an *employer's* reasons for a similar exclusion when private plans are involved. Consequently, whenever an insurer—state or private—advances a rationally supportable basis for his distinctive treatment of pregnancy under his benefit program, this treatment should not inherently constitute interdicted sex discrimination, notwithstanding the Commission's guidelines.

14. These factors commonly have been examined by courts in evaluating the weight to be given to administrative guidelines. *Espinoza* v. *Fara Manufacturing Co., supra; Skidmore, et al.* v. *Swift and Co.*, 323 U. S. 134 (1944); Davis, *Administrative Law Text*, Section 5.03 (1959).

15. Title VII of the Civil Rights Act of 1964 was enacted on July 2, 1964, with an effective date of July 2, 1965.

that *they were not required to provide the same fringe benefits for pregnancy as they provided for illness or injury.*

For example, in an opinion letter, dated November 15, 1966, sixteen months after Title VII became law, the Commission's General Counsel stated:

"Gentlemen:

> You state that under your collective bargaining agreement *male and female employees are granted sick leave with pay. Female employees, however, are granted maternity leaves without pay;* although their services are not terminated. You inquire whether this policy is in compliance with Title VII of the Civil Rights Act of 1964.
>
> *The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity,* since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. Accordingly, we believe that to provide substantial equality of employment opportunity for both sexes, there must be special recognition for absence due to pregnancy, and for this reason have stated that, generally speaking, a leave of absence should be granted for pregnancy whether or not it is granted for illness. On the other hand, we do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness, and, consequently, it is our view that the policy you describe is not in violation of Title VII.
>
> Sincerely yours,
>
> CHARLES T. DUNCAN
> *General Counsel*"
>
> (November 15, 1966)
> (emphasis supplied)[16]

Within sixteen months after the enactment of Title VII, then, the Commission had advised employers that they need not "pro-

16. The General Counsel promulgated virtually identical statements in November and December, 1966. See, e.g., CCH Employment Practices 12-21-66, paragraph 17,304.43.

vide the same fringe benefits for pregnancy as [they provided] for illness . . ." and that the Commission did not require comparable treatment for illness and pregnancy.

The Commission, still demonstrating consistency, maintained this position through 1969. On June 19, 1969, a representative of the Commission announced that the Commission "views pregnancy as a temporary disability, and has not to date equated it with sickness." The Commission then ruled that an employer *may grant maternity leave without pay even though it provided pay for sick leaves.*[17]

The Commission's consistency came to an abrupt halt on April 5, 1972. Then for the first time the Commission declared in an opinion guideline that pregnancy and illness were the same after all for the purposes of an employer's disability policy.[18] The 1972 opinion, of course, has not been consistently applied for a long period of time because it is only the most recent Commission view on the subject, and because it is totally and remarkably

17. CCH, *New Developments Paragraph 8804,* EEOC Attorney Discusses Sex Discrimination and Fringe Benefits Under Title VII, 1964 Civil Rights Act.

18. Whether expressed in a guideline, letter or reported investigation of a specific charge, the Commission's statements and views are merely its *opinions* concerning *inter alia* whether particular conduct violated Title VII. Any so called "EEOC decisions" which may concern the subject in question are not, therefore, decisions at all, but merely reported investigations following a charge, and the report contains the investigators' or prosecutors' opinion that "reasonable cause" does or does not exist to believe Title VII has been violated. Moreover, the so called "decisions" have even less value than the guidelines. While a guideline is the expression of a current opinion by the administrator on the meaning of the statute, a reported investigation states merely that based on the *facts then present* in that case there is or is not *reasonable cause* to believe that the Act has been violated. Arguments or reasons advanced as the case progresses can alter the opinion, and it is of little guidance unless a subsequent case is factually "on all fours." *Robinson* v. *Lorillard Corporation,* 444 F. 2d 791, 801 (CA 4, 1971). Thus, while the arguments in this brief are directed primarily against the Commission's 1972 guideline opinion, these arguments, here and elsewhere, may apply equally to any investigation reports that may represent a change in direction by the Commission.

inconsistent with prior opinions issued over the last several years. Moreover, it is these prior opinions, rather than 1972 opinion, that are contemporaneous constructions of Title VII.[19] What weight then can be given to this 1972 opinion? Applying the criteria of consistent application and contemporaneous construction, the answer is, "none". Moreover, the answer does not change when other relevant criteria are applied.

b. *The Sex Discrimination Guideline Was Not Issued with the Evident Thoughtfulness That Marks Agency Expertise.*

There is no evidence that the new 1972 opinion was formulated with consideration for alternatives or concern for ramifications. Moreover, when the Commission, after several years of consistently applying the Act, abruptly changed its interpretation and consequent application of the Act, it must prove clearly and convincingly that its new interpretation is justified by a change in Congressional policy or by new facts not previously in existence.[20] Only if it meets this explicit proof burden is its new opinion entitled to any judicial consideration. The Commission has offered no such proof here. Indeed, its astonishing and erratic shift belies its obvious claim of expertise.

This much, then, is now clear. In evaluating the weight to give an agency's opinion as to the meaning of a statute, the courts commonly consider a variety of factors. When the Commission's 1972 opinion concerning fringe benefits and maternity or pregnancy is viewed in light of these factors, it is clear that this opinion is entitled to neither weight nor deference.

19. Since the opinion letters referred to in the text represent contemporaneous interpretations of Title VII and are consistent with each other, it is these letters, rather than the guideline in question that are entitled to judicial deference. *Williams* v. *New Orleans Steamship Assn.*, 341 F. Supp. 613 (E. D. La., 1972); *N. L. R. B.* v. *Boeing Co.*, 412 U. S. 61 (1973).

20. *Newman* v. *Delta Air Lines, Inc., supra.* There, the court held that the guideline here in question was not binding on the court because there appeared to be no factual basis upon which the guideline was drawn. The Court also found that the denial of employment benefits to employees on maternity leave did not violate Title VII.

After promulgating the challenged guideline, the Commission apparently hoped to rely upon *Griggs* to secure prompt judicial approval. However, *Griggs is distinguishable* and indeed, supports the view that the guideline in question here is entitled to no weight. In the first place, the statement by this Court in *Griggs* that agency guidelines were entitled to "great deference"[21] must not be overvalued, but rather should be confined to the facts of that case. As the Sixth Circuit in *Espinoza* v. *Farah Manufacturing Co.*, observed:

> "In *Griggs*, the Court found that '(s)ince the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.' 401 U. S. at 434. Moreover, in that case the Court made an independent analysis of the pertinent legislative history and decided that 'the conclusion is inescapable that the EEOC's construction . . . comports with Congressional intent.' 401 U. S. at 436"[22]

This Court in *Espinoza* adopted the logic of this statement.

Here, unlike *Griggs* and contrary to the court below, there is no evidence whatever that Congress intended an employer to provide fringe benefits for pregnancy on the same terms as he provides benefits for illness or to treat these distinct conditions in the same manner.[23]

21. at 433-434.

22. *Espinoza* v. *Farah Manufacturing Co.*, 462 F. 2d 1331, 1334 (CA 6, 1972).

23. There was little or no legislative history on sex discrimination. *Newmon* v. *Delta Air Lines, Inc., supra.*

However, Congress had ample precedent had it desired to require an employer to treat pregnancy and illness in the same manner. In 1968, considering the Railroad Unemployment Insurance Act of 1946, Congress amended the definition of a day of sickness in that Act to include with respect to "a female employee, a calendar day on which because of pregnancy, miscarriage, or the birth of a child (i) she is unable to work or (ii) working would be injurious to her health."

In addition, Congress had access to arbitrators' decisions which for two decades equated pregnancy and illness and required an employer to apply the same benefit policies to both. (*Middleton Board*

In addition, when *Griggs* was decided the Commission did not have prosecutorial powers. These powers were accorded to the Commission on March 24, 1972. Yet while giving these new prosecutorial powers to the Commission, Congress did not accord to the Commission the power to make substantive law. The relevant legislative history leaves room for no reasonable doubt, since in Section 713(a) of Title VII (42 U. S. C. 2000e-12(a)), the word "procedural" was inserted by amendment on the floor of the House to make clear that the Commission did not have the power to make substantive regulations.[24]

The Commission was rather required to prosecute its cases in a federal district court, and it is the courts that are to interpret the Civil Rights Act and apply the law. There is no doubt that Congress can bestow upon an agency the power to make substantive law. The National Labor Relations Board is an example of an agency to which Congress has given the power to make substantive law. Within the statutory framework of the National Labor Relations Act, the General Counsel and the Board itself have the power to create a substantial body of labor law and courts have justifiably deferred to the Board's expertise.[25] Because the Commission has not been given the power to create substantive law, its guidelines may now inform the public of what the prosecutor consideres illegal, but there is no reason for a court to accord the prosecutor's views a special sanctity or to view them as a body of law having binding force. The

of Education, 56 LA 830 (1971); *National Lead Co.,* 18 LA 528 (1952); *Republic Steel Corp.,* 37 LA 267 (1961).) Nonetheless, despite these decisions, Congress chose not to require that employers treat pregnancy and illness alike in fringe benefit programs.

It is apparent, therefore, that had Congress desired to amend the Civil Rights Act in 1972 or at any time to require employers to treat pregnancy and illness in a similar manner when formulating or implementing benefit programs, Congress would have enacted such an amendment. See footnote 4, *supra.*

24. 110 Cong. Rec. 2575 (1964).

25. The Board's rules concerning what constitutes an effective contract bar to a representation election are one example.

Commission's opinions are just that—its view of what constitutes illegal conduct and a court should treat them as nothing else. The Commission, like the Justice Department, has been accorded only prosecutorial functions, and like the Justice Department cannot fashion the law it elects to present. This is the fundamental distinction between agencies given only prosecutorial roles and those, such as the National Labor Relations Board, to which Congress has given adjudicative and regulatory functions as well as prosecutorial duties. When dealing with the Commission in its new prosecutorial function, the court has the ultimate responsibility to determine the law and it must not abdicate this responsibility to the prosecutor by deference to his guidelines.

CONCLUSION.

For all the foregoing reasons, the *amicus* urges that this Court grant the petition for writ of certiorari.

Respectfully submitted,

GERARD C. SMETANA,
JERRY KRONENBERG,
JULIAN D. SCHREIBER,
BOROVSKY, SMETANA, EHRLICH & KRONENBERG,
2011 Eye Street, N.W.,
Suite 800,
Washington, D. C. 20006,
Attorneys for the Amicus Curiae.

MILTON A. SMITH,
General Counsel,

RICHARD B. BERMAN,
Labor Relations Counsel,
Chamber of Commerce of the United States of America,
1615 H Street, N.W.,
Washington, D. C.,
Of Counsel.

APPENDIX A.

The Chamber has learned of the following facts and presents them to this court for its consideration.

The Health Insurance Association of America and the American Life Insurance Association, representing approximately 500 life and health insurance companies and accounting for approximately 90% of the total private health and life insurance programs in force in the United States, have stated:

> "Under a typical disability income plan with an average group of employees [assuming 38% to 40% are women], the addition of a disability income benefit to cover maternity absences would result in an additional cost to the employer of about 40 to 50 percent of his current costs for the plan." (Joint comments filed in response to a proposal by the Office of Federal Contract Compliance to require that federal contractors provide disability benefits for workers absent from work due to pregnancy, 38 Fed. Reg. 35336-35338 (December 27, 1973); Comment at 9 (February 11, 1974) (Reply brief for Appellant, page 18, *Geduldig* v. *Aiello, supra.*

The experience of one major employer, American Telephone and Telegraph Company, confirms the validity of the foregoing statement. Based upon its calculations, considering the average salary and seniority of eligible women, costs for disability benefits would have been increased by $15,762,663 in 1970-71 and $19,037,330 in 1971-72 if pregnancy has been covered. These estimates include only basic disability costs and exclude such wage related costs as social security, pension, health insurance, etc. The estimate assumes an average pregnancy disability of eight weeks. Costs would have increased respectively to $32,-739,007 and $39,539,070 if payment for the full average maternity leave period of five and one-half months had occurred.

Moreover, if pregnancy had been included in the survey years, 21% of the total days for which disability payments were made would have been attributable to 5% of the eligible women or 2.5% of the employer's working force. No other disability group, even considering both sexes, could generate such a great number of disability days for which benefits would be paid. (Page 11 in Brief of American Telephone and Telegraph Company as *amicus curiae* in *Geduldig* v. *Aiello, supra.*)

The State of California's experience under its unemployment insurance code is consistent with the foregoing. Women presently receive $1.27 in benefits for each $1.00 contributed while men receive $.80. The addition of benefits for normal pregnancy, assuming that contributions did not increase nor benefits decrease, would cause the female benefit rate to increase to $2.33 while the male rate would remain at $.80. (According to the State, in order to preserve the fiscal integrity of its program, contributions would have to increase or benefits decrease; in either event the benefit ratio between men and women would remain the same.) The experience of the State of Hawaii is similar. Coverage of pregnancy under the State's disability program has caused disability premiums for females to increase from $4.00 per month to $8.76 per month. (Reply brief for the Appellant, pages 17-21 in *Geduldig* v. *Aiello, supra.*)

Supreme Court, U. S.
FILED
APR 23 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF AMERICAN LIFE INSURANCE ASSOCIATION, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AMERICAN MUTUAL INSURANCE ALLIANCE, AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

KENNETH L. KIMBLE
General Counsel
American Life Insurance Association
1730 Pennsylvania Avenue, N. W.
Washington, D. C. 20006
PAUL C. BLUME
General Counsel
National Association of Independent Insurers
2600 River Road
Des Plaines, Illinois 60018
RICHARD E. GOODMAN
Assistant General Counsel
American Mutual Insurance Alliance
20 North Wacker Drive
Chicago, Illinois 60606
THOMAS J. GILLOOLY
Associate General Counsel
Health Insurance Association of America
750 Third Avenue
New York, New York 10017
Attorneys for the Amici

Sunsharp-Warren Printing Company, Chicago • 346-1717

INDEX

PAGE

Interest of the Amici 1

Reasons for Granting the Writ 3

Conclusion 7

AUTHORITIES CITED

Communications Workers of America v. A. T. & T. Co., ... F. 2d ....., 10 FEP Cases 435 (2nd Cir., No. 74-2191, March 26, 1975) 7

Geduldig v. Aiello, 417 U. S. 484 (1974) ..... *passim*

Newmon v. Delta Airlines, Inc., 374 F. Supp. 238 (N. D. Ga. 1974) 4

Phillips v. Martin-Marietta Corp., 400 U. S. 542 (1971) 6

REGULATIONS

E. E. O. C. Guidelines on Discrimination Because of Sex, 29 C. F. R. § 1604.9(e) 2, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF AMERICAN LIFE INSURANCE ASSOCIATION, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AMERICAN MUTUAL INSURANCE ALLIANCE, AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICI[1]

The four *amici* are associations whose collective membership constitute most of the major life, health, property and casualty

1. Pursuant to Supreme Court Rule No. 42(1), this brief is being filed along with written consents from all parties to this proceeding.

insurers in the nation.[2] Thus, the American Life Insurance Association and Health Insurance Association of America represent approximately 500 life and health insurance companies, accounting for about 92 percent of the total life insurance in force in the United States, 90 percent of the total health insurance written by insurance companies, and over 99 percent of the assets of insured pension plans. Similarly, the National Association of Independent Insurers has 411 member companies, while American Mutual Insurance Alliance has approximately 100 member companies, all engaged in the property and casualty insurance business. In addition to being interested as insurers to the Court's consideration of the important question involved herein, the amici' membership, which collectively employ well over one million persons, are also vitally affected as employers in the outcome of this case.

The decision of the lower court—announcing for the first time by a United States Court of Appeals that an employer may not exclude coverage for pregnancy from the risks covered by its employee disability income program when the plan covers most disabilities attributable to sickness and accident—severely undermines the flexibility of employers in tailoring their benefit plans to achieve the broadest coverage at lowest cost for all employees. Moreover, the Court of Appeals' endorsement[3] of the EEOC's guideline[4]—apparently promulgated by the Commission, oblivious to its significance, that "the cost of such benefits" is *not* a permissible consideration, obliterates the basis upon which objective, nondiscriminatory benefit coverage decisions are made by employers. Finally, in *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), this Court held that a public insurer could decline

2. Liberty Mutual Insurance Company is a member of the American Mutual Insurance Alliance and the Health Insurance Association of America, but is not a member of the National Association of Independent Insurers. Liberty Life Assurance Company of Boston, a subsidiary of Petitioner, is a member of the American Life Insurance Association.

3. Pet. App. p. 14.

4. 29 C. F. R. § 1604.9(e).

coverage for pregnancy under its public disability income plan on the grounds that such risk selection was permissible in the absence of a pretextual attempt to discriminate on the basis of sex. The *amici* believe that private employers should similarly be able to objectively allocate risk selection in the same fashion; in the absence of a showing that such risk selection is not objectively based, e.g., that it is designed to discriminate against women, it is permissible.

REASONS FOR GRANTING THE WRIT

In *Geduldig* v. *Aiello*, 417 U. S. 484 (1974) this Court sustained the constitutionality of the State of California's exclusion of coverage for disabilities incident to pregnancy from its public disability insurance program. In so ruling, the Court concluded that the exclusion was not discriminatory and was in accord with proper insurance concepts:

> "It is clear that California intended to establish this benefit system as an insurance program that was to function essentially in accordance with insurance concepts."[5]

Deference to insurance concepts was, of course, not deemed absolute; but "absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination"[6] the exclusion was deemed lawful. The *amici* respectfully submit that a private employer in the statutory context should be treated no differently: An employee benefit plan which nondiscriminatorily excludes pregnancy coverage due to objective cost considerations, is based upon a legitimate, rather than discriminatory, business practice.

1. The decision of the lower court severely undermines the flexibility of employers to provide coverage for their employees based upon objective assessment of the liability projected for the risks covered and a desire to achieve maximum

5. *Aiello*, 417 U. S. at 492 (footnote omitted).

6. *Id.* at 496, n. 20.

risk coverage by declining to include certain high cost risks. Several factors demonstrate that the exclusion of coverage for pregnancy related disabilities are objectively based, and, moreover, that the nature of the risk involved is of such a totally different order than covered risks, so as to render its different treatment not discriminatory.

First is *cost*: pregnancy contemplates a minimum six week period of disability, usually from three weeks before delivery to three weeks after.[7] The exclusion of coverage for pregnancy is, accordingly, a significant cost based factor. The E. E. O. C.'s guideline, however, that cost may *not* be a legitimate factor in benefit coverage [29 CFR § 1604.9(e)], which was endorsed by the Court of Appeals,[8] radically, but unjustifiedly, undermines this traditional coverage criterion and thus warrants review by this Court.

Second, the *character* of the risk is fundamentally different from sickness and accident related disabilities in that, in this day and age, most pregnancies are voluntarily contracted,[9] in contrast to sickness and accidents which are involuntarily contracted. The lower court's glossing over this critical distinction with the observation that "there are a great many activities that people participate in that involve a recognized risk . . . drinking intoxicating beverages, smoking, skiing, handball and tennis are all types of activities in which one could sustain harm" (Pet. App. p. A12)—is specious. For it is the role of insurance to provide protection for contingent risks which may occur from participation in such activities, *not* to subsidize activities voluntarily entered into with knowledge, and indeed the *intent* to incur

7. Moreover, this period is subject to extension, and consequently increased cost, due to post delivery sensitivity which is not capable of evaluation due to psychological overtones frequently involved.

8. The Court of Appeals, uncritically accepting the E. E. O. C.'s guideline, stated "[w]e agree that cost is no defense under Title VII to this particular issue." (Pet. App. p. A14)

9. See *Newmon* v. *Delta Air Lines Co.*, 374 F. Supp. 238 (N. D. Ga. 1974).

the disability sought to be covered. In such instances, the proceeds of the insurance are not for a contingent unwanted risk, but rather is a *subsidy* for a usually planned result.

Third, given the purpose of private disability coverage to tide employees over until their return to work, that purpose is not served by providing coverage for pregnancy, inasmuch as employees, more often than not, do not return to work after delivery.[10] In such circumstances, pregnancy benefits become not a form of insurance, but rather, a unique form of severance pay.

Coverage for pregnancy, therefore—apart from the objective considerations of cost—is of *totally different order* than sickness and accident insurance coverage, and refusal to provide coverage for it, therefore, cannot be deemed discrimination in enjoyment of benefits. That fact, together with the destructive impact that the Court of Appeals' decision has on heretofore accepted employers' flexibility in providing disability insurance, compels review by this Court.

2. The position of the E. E. O. C., advanced to the Court of Appeals, demonstrates the critical need for this Court to provide standards for determining whether disability insurance benefit availability violates Title VII of the Civil Rights Act of 1964, as amended. Before that Court, the E. E. O. C. urged:[11]

> If an insurance policy covered every disability except that arising from hemophilia, a disease with particularly high incidence among men, such a policy, although neutral on its face, would result in disparate treatment of men. Whether that policy could or could not be justified on the basis of other considerations would be a matter to be determined under appropriate standards.

10. It was Petitioner's experience, for instance, that almost 80 percent of its employees who became pregnant, never returned to work at the Company. (Appendix annexed to Appellant's Brief to the Court of Appeals.)

11. Brief for the E. E. O. C. as *amicus curiae*, p. 13 (3rd Cir., No. 74-1233).

Nowhere, however, does the Agency explain or indicate what those "appropriate standards" would be. Thus, its analysis is particularly shocking, because the *amici* are unaware of any disease whose incidence is precisely the same among both sexes. Apparently, under the Commission's view, it may be unlawful to exclude coverage for any disability from a comprehensive disability insurance program unless the rate of affliction is the *same* for each sex. This view, it is submitted, is preposterous; at a minimum it explodes beyond recognition the congressional purpose of removing institutionalized barriers to employment opportunities for females.[12] The Commission's untenable position demonstrates the clear need for this Court to develop those "appropriate standards" in this case.

3. The foregoing demonstrates that the premise implicit in the Commission's guideline—that pregnancy is the same as all other disabilities—is unfounded, and that its exclusion therefore cannot be deemed benefit discrimination. But even assuming, *arguendo*, the validity of that premise, the exclusion of pregnancy from coverage does not constitute *sex* discrimination within the meaning of Title VII. For here, as in *Aiello*,[13] "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." That finding remains the same in the statutory context involved herein, as well as in the constitutional context involved in *Aiello;* the conclusion that obtained in *Aiello*, it is submitted, can therefore be no different in this case. However, due to the divisiveness this very question has generated in the federal judiciary (see Petition, pp. 10-11), the *amici* urge the Court to utilize this case to settle the issue with finality.

Moreover, as the Second Circuit has only recently recognized, the E. E. O. C.'s pregnancy benefit guidelines are inescapably inconsistent with this Court's decision in *Aiello* (417 U. S. 496,

12. See *Phillips* v. *Martin-Marietta Co.*, 400 U. S. 542, 544 (1971).

13. 417 U. S. at 496; and *Id.* n. 20.

n. 20), a conclusion which that Court found to be "inconceivable."[14] This troublesome question is, therefore, one which only this Court can, and should, resolve.

CONCLUSION

For the reasons stated herein, as well as those stated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KENNETH L. KIMBLE
General Counsel
American Life Insurance Association
1730 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

PAUL C. BLUME
General Counsel
National Association of Independent Insurers
2600 River Road
Des Plaines, Illinois 60018

RICHARD E. GOODMAN
Assistant General Counsel
American Mutual Insurance Alliance
20 North Wacker Drive
Chicago, Illinois 60606

THOMAS J. GILLOOLY
Associate General Counsel
Health Insurance Association of America
750 Third Avenue
New York, New York 10017
Attorneys for the Amici

14. *Communications Workers of America* v. *American Telephone and Telegraph Co.*, ... F. 2d ....., ... FEP Cases ..... (2nd Cir., No. 74-2191, March 26, 1975).

Supreme Court, U. S.
FILED
JUL 25 1975
MICHAEL RODAK, JR., CLERK

APPENDIX.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 2, 1975
CERTIORARI GRANTED MAY 27, 1975.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

INDEX

	PAGE
Docket Entries	1
Complaint	16
Answer	20
Charge Before Pa. Civil Rights Commission	24
Deposition of K. D. Spaulding, 10/17/72	26
Deposition of K. D. Spaulding, 11/27/72	81
Motion for Summary Judgment	84
Exhibit E Attached Thereto	86
Exhibit H Attached Thereto	88
Exhibit I Attached Thereto	90

Exhibit J Attached Thereto 92
Exhibit K Attached Thereto 94
Exhibit L Attached Thereto 96
Exhibit M Attached Thereto 98

Charge of Discrimination—EEOC—Sandra Wetzel 102
Charge of Discrimination—EEOC—Mari B. Ross 105
Response to Motion for Summary Judgment 107
Wetzel Affidavit—10/31/1973 101
Opinion of District Court—1/9/74 133
Motion for Reconsideration—1/30/74 164
Memorandum Order of District Court—2/20/74 183
Notice of Appeal 187
Motion for Leave to Present Background Statistics and Affidavit of K. D. Spaulding, Third Circuit 188
Appellees' Response in Opposition to Appellant's Motion for Leave to Present Background Statistics, Third Circuit 192
Appellant's Response to Appellees' Opposition to Motion for Leave to Present Background Statistics, Third Circuit.. 194
Order—Third Circuit on Appellees' Motion for Leave to Present Background Statistics 197
Statutes and Regulations 198

APPENDIX

DOCKET ENTRIES

72 169 Sandra Wetzel etc. vs. Liberty Mutual Ins.

Date 1972	Proceedings	
Feb. 28	Complaint Filed	1
Feb. 28	Summons Issued	1
Feb. 28	Pltfs Notice of service of Interrogatories to Deft (First Set) filed	2
Feb. 28	Pltfs Notice of service of Interrogatories to Deft (Second Set) filed	3
Feb. 28	Notice of taking the Depositions of Kenneth Raymond on 4-3-72, Wilford Aune on 4-6-72, Dick Dancer on 4-12-72 and James W. Roop on 4-17-72..	4
Feb. 28	Pltf's Request for Production of Documents—First Set filed	5
Feb. 28	Pltf's Motion for Class Action Determination filed	6
Mar 2	Marshal's Form 285 returned served on deft on 3-1-72	7
Mar. 9	Praecipe for appearance of Kalvin M. Grove and Robert A. Penney, Esqrs. as counsel for deft. filed...	8
Mar. 10	Praecipe for appearance for Liberty Mutual Ins. Co. filed by Clem R. Kyle, Esq.	9
Mar. 10	Memorandum order fixing preliminary conference of counsel for 4-4-72 at 11 A.M. (Weber, J.) ..	10
Mar. 14	Stipulation for extension of time to answer and proposed order filed	11

Mar. 14—Order ent. upon filing stip for extension of time, granting time to Liberty Mutual Ins. to answer to and including 4/20/72 (Weber, J.) 11

Apr. 5—Hearing on conference of counsel re deposition held before Weber, J. and concluded Cav. Memo. filed (protective order dictated on record of the deposition) 12

Apr. 5—Order ent. re pretrial schedule to be observed by parties (Weber, J.) 13

Apr. 19—Answer filed 14

May 1—Deft's Answers to pltfs Interrogatories (Second Set) filed. (Nos. 1-11) 15

May 1—Deft's Answers to pltfs Interrogatories (First Set) filed (Nos. 1-41) 16

May 16—Proposed demand for jury trial filed by pltf. .. 17

May 17—Memorandum order striking proposed demand for jury trial under Rule 383; directing that motion be filed under Rule 393; if motion is filed, deft. to respond in 15 days, matter will be decided on briefs (Weber, J.) 18

May 22—Notice, motion for jury trial and proposed order filed by pltfs 19

May 23—Order entered directing deft file a Response to Pltfs Motion for Jury Trial on or before 6-5-72 showing cause if any why the court should not order Jury Trial. (Weber, J.) 20

June 5—Deft's response to pltfs' motion for jury trial and proposed order filed 21

June 9—Memorandum Order directing Pltf file reply brief on or before 6-23-72 and court will determine matter of briefs. (Weber, J.) 22

June 28—Deposition of Kenneth W. Raymond filed 23

July 3—Motion for extension of time in which to file brief on pltfs' rule 23 motion and proposed order filed by deft 23A

July 5—Deft's response to pltf's reply brief re: Demand for Jury trial 24

July 5—Order entered extending to 7/21/72 the time for deft to submit brief in re Rule 23 motion (Weber, J.) 25

Aug. 1—Notice to counsel fixing argument on Motion for Class Action for 8/16/72 at 1:30 P.M. before Weber, J. 26

Aug. 4—Deposition of Kenneth W. Raymond filed 27

Aug. 16—Hearing held on Motion for Class Action Determination and Demand for Jury Trial before Weber, J. Hearing memo filed. (Rep. J. Lilienthal) (Concluded—Cav) 28

Aug. 17—Memorandum Order dated 8/16/72 entered granting pltf's Motion for determination of class action; order is conditional, subject to further Order. (Weber, J.) 29

Aug. 17—Order dated 8/16/72 entered deferring determination on pltfs' Demand for Jury Trial until pretrial conference. (Weber, J.) 30

Aug. 18—Notice of taking depositions of Edmund A. Carr on 9/11; of Daniel Phillips on 9/12 of W. Lawrence Usher on 9/13 filed by plfs 31

Aug. 29—Pltfs Notice of Service of Interrogatories to Deft-Third Set filed 32

Sept. 11—Notice, application for class notification with proposed notice and proposed order filed by pltfs .. 33

Sept. 14—Memorandum Order entered directing that before any notice is approved by this court it will have

to consider further the proposition of the class or sub class (Weber, J.) 34

Sept. 27—Deft's Answers to Pltf's Interrogs (Third Set) filed. (Nos. 1-26) 35

Oct. 6—Notice of depositions of Kenneth Spaulding and Kenneth Raymond on 10/17/72 at 10:00 A.M. and 3:00 P.M. respectively filed by Pltfs 36

Oct. 6—Notice of deposition of Marian Holliday on 10/18/72 at 2:00 P.M. filed by pltfs 37

Oct. 12—Notice, motion for production of documents and proposed order filed by pltfs 38

Oct. 13—Notice of service of Interrogs upon defts. filed by pltfs 39

Oct. 16—Motion for permission to obtain discovery and proposed order filed by deft 40

Oct. 17—Order entered directing deft to file response to Motion for Production by 11/1/72 and moving party file reply on or before 11/8/72. (Weber, J.) 41

Nov. 2—Response of Liberty Mutual Insurance Co. to Motion for Production of Documents, filed 42

Nov. 9—Motion for protective order and proposed order re pltfs' 4th set of interrogs. filed by deft 43

Nov. 9—Order entered directing that Court will hear counsel with respect to all pending discovery motions on 11/27/72 at 3:30 P. M. (Weber, J.) 44

Nov. 13—Deft's Answers to Pltfs Interrogs filed. (Nos. 1-11) 45

Nov. 14—Transcript of argument held 8/16/72 before Weber, J. filed (Rep. L. Lilientha) 46

Nov. 16—Deposition of Mari Ross filed 47

Nov. 16—Deposition of Sandra Wetzel filed 48

Nov. 16—Deposition of Wilfred B. Aune filed. (Taken 9/12/72) 49

Nov. 16—Deposition of Wilfred B. Aune filed. (Taken 10/13/72) 50

Nov. 16—Deposition of James W. Roop filed. (Taken 9/13/72) 51

Nov. 16—Deposition of James W. Roop filed. (Taken 10/13/72) 52

Nov. 16—Deposition of Richard R. Danser, filed. (Taken 9/11/72) 53

Nov. 16—Deposition of Richard R. Danser, filed. (Taken 10/13/72) 54

Nov. 16—Deposition of Marian Holliday filed 55

Nov. 27—Hearing held on Motion for Production, Motion for Permission to Obtain Discovery and Motion for Protective Order before Weber, J. and taken Cav. (Memo filed) (Rep. None) 56

Dec. 19—Transcript of Oral Argument held 11/27/72 before Weber, J. filed. (Rep: M. Mimless) 57

Dec. 19—Notice of fifth set of interrogs to deft filed by pltfs 58

Dec. 21—Deposition of Daniel D. Phillips filed 59

Dec. 21—Deposition of Edmund A. Carr filed 60

Dec. 21—Continued Deposition of Edmund A. Carr filed 61

1973

Jan. 18—Motion for Protective Order filed by deft 62

Jan. 19—Deft's Answers to Pltf's Interrogs filed. (Nos. 1-46) (Fifth Set of Interrogs) 63

Jan. 22—Protective Order entered directing that deft's answer to pltf's interrogatory fifth Set No. 21 be placed in a sealed envelope and marked "To Be Opened Only as Directed by the Court. (Weber, J.) 63A

Jan. 30—Deposition of Kenneth Spaulding filed 64

Jan. 30—Continued Deposition of Kenneth W. Raymond 10/17/72 65

Feb. 2—Letter of 1/31/73 to Clerk with Sealed Fifth Set of Interrog No. 21 to Pltf with deft's answer thereon filed. (Placed in Safe per Order of 1/22/73) .....

Feb. 7—Memorandum Order entered Granting defts Motion for Protective Order in answering questions 7, 8, 9 and 10 of the 4th Set of Interrogs. (Weber, J.) 66

Mar. 12—Motion for Reconsideration filed by Pltf. 67

Mar. 20—Conference of Counsel held 3/19/73 before Weber, J. and concluded. (Memo filed) (Rep: None) 68

Mar. 22—Order entered denying Pltf's Motion for Reconsideration of its Memorandum Order of 2/17/73. (Weber, J.) 69

Mar. 26—Motion for Summary Judgment filed by Pltfs .. 70

Mar. 30—Order entered directing plts; submit brief in re motion for summary judgment by 4/30/73; deft. by 5/15/73. (Weber, J.) 71

April 4—Notice of deposition of Mary Kay Reardon on 5/10/73 at 9:00 A.M. filed by deft 72

April 4—Notice of deposition of Alice Welch on 6/5/73 at 9:00 A.M. filed by deft 73

April 4—Notice of deposition of Marilyn A. Huffstutter on 5/8/73 at 9:00 A.M. filed by deft 74

April 4—Notice of deposition of Margaret A. Hans on 5/16/73 at 9:00 A.M. filed by deft 75

April 4—Notice of deposition of Ms. Boydyne M. Ross on 5/1/73 at 9:00 A.M. filed by deft. 76

April 11—Notice of interrogs on pltf filed by deft 77

April 25—Stipulation for extension of time for parties to file briefs and evidentiary material re motion for summary judgment and proposed order filed 78

April 26—Order entered granting extension of time of parties to file briefs in support of Motion for Motion of Summary until 6/15/73; deft file their briefs extended to 7/13/73. (Weber, J.) 78A

May 21—Motion for protective order re sealing of deposition exhibits and proposed order filed by deft 79

May 23—Pltfs Answers to Deft's First set of Interrogs filed. (Nos. 1-2) 80

May 25—Proposed protective order filed .....

June 21—Affidavit of Sandra Wetzel in Support of Pltfs Motion for Summary Judgment filed 81

June 21—Affidavit of Mari Ross in support of Pltf's Motion for Summary Judgment filed 82

June 21—Affidavit of Howard A. Specter in Support of Pltf's Motion for Summary Judgment filed 83

June 25—Motion for an extension of time in which to respond to pltfs' motion for summary judgment and proposed order filed by deft 84

June 27—Motion of the United States Equal Employment Opportunity Commission to file a brief and present oral argument as Amicus Curiae filed 85

June 28—Order entered granting motion of counsel for U. S. Equal Employment Opportunity Commission to file brief and present oral argument as amicus curiae. Name of Local counsel for U. S. Equal Employment Opportunity Comm. shall be noted on docket as party to receive copy of all notices and pleadings in this case. (Weber, J.) 85A

June 28—Order entered setting hearing on Motion for Summary Judgment for 9/24/73 at 9:30 a.m. (Weber, J.) 86

June 29—Protective Order entered 6/28/73 directing that all personnel files being marked as exhibits to the de-

positions of deft's present and past employees and all statements being marked and attached as exhibits be placed in a sealed envelope and filed with the Clerk of the Court and marked (To Be Opened Only as Directed by the Court). (Weber, J.) 87

July 5—Deft's Amended Answers to Pltf's Fifth Set of Interrogs filed 88

July 16—Discovery Deposition of Boydyne Ross with Amendment and exhibits attached thereto filed. (Ex's marked Only to Be Opened by Court Order) 89

July 16—Ex's received from Commerce Reporting Company. (Large envel placed in file) (Marked To Be Opened as Directed by the Court) .....

July 16—Deposition of Mary Kelly filed 90

July 19—Deposition of Diane C. Turnipseed filed 91

July 19—Deposition of Marilyn A. Huffstutter filed 92

July 19—Deposition of Donna Diklich filed 93

July 19—Exhibits to Deposition of Marilyn A. Huffstutter filed. (Placed in Safe—Marked to be opened only as directed by the Court) (2 envelopes) .....

July 19—Exhibits to Deposition of Diane A. Turnipseed filed. (Placed in Safe—Marked to be opened only as directed by the Court) (1 envelope) .....

July 19—Exhibits to Deposition of Donna Diklich filed (Placed in Safe—Marked to be opened only as directed by the Court) (1 envelope) .....

July 23—Deposition of Mary Kay Reardon filed 94

July 23—Exhibits to Deposition of Mary Kay Reardon filed. (Marked, To Be Opened Only as Directed by the Court) (Placed in Safe) .....

July 27—Deposition of Carol Dolaoglu filed 95

July 31—Deposition of Zoanne Salter filed 96

July 31—Deposition of Ethel Smith filed 97

July 31—Exhibits to Deposition of Zoanne Salter filed. Marked "To Be Opened only as directed by Court." 1 envelope. (Placed in safe) .....

July 31—Exhibits to Deposition of Ethel Smith filed. Marked "To Be Opened only as directed by Court." 1 envelope. (Placed in safe) .....

Aug. 17—Notice, motion for amendment of memorandum order on pltfs' motion to determine class action and proposed order filed by pltfs 98

Aug. 27—Order entered fixing hearing on Motion to Modify for 9/24/73 at 9:30 A.M. (Weber, J.) 98A

Aug. 31—Motion of the Chamber of Commerce of the United States for Leave to Participate as Amicus Curiae 99

Sept. 4—Response of Deft to Pltf's Motion to Summary Judgment filed 100

Sept. 4—Certificate of service of Motion of Chamber of Commerce of the U. S. for Leave to Participate as Amicus Curiae and Brief of the Chamber of Commerce of the U. S. in support of the deft filed 101

Sept. 12—Notice rescheduling hearing set for 9/24/73 at 9:30 A.M. to 9/24/73 at 11:00 A.M. before Weber, J filed 102

Sept. 14—Response of Deft to Motion for Amendment of Memorandum Order on Pltf's Motion to Determine Class Action filed 103

Sept. 20—Deposition of Carolyn Ann Pastore filed 104

Sept. 20—Deposition of Carol Rusching Tilley filed 105

Sept. 20—Deposition of Alice Welch filed 106

Sept. 20—Deposition of Lenore King filed 107

Sept. 20—Deposition of Margaret Gail Martin filed 108

Sept. 20—Exhibits to Deposition of M. Gail Martin filed. (Marked To Be Opened Only as Directed by the Court) (Placed in safe) .....

Sept. 20—Exhibits to Deposition of Alice Welch filed. (Marked to be Opened Only as Directed by the Court) (Placed in safe) .....

Sept. 20—Exhibits to Deposition of Carolyn Ann Pastore filed (Marked to be opened only as Directed by the Court) (Placed in safe) .....

Sept. 20—Exhibits to Deposition of Carol Rusching Tilley filed. (Marked to be opened only as directed by the Court) (Placed in safe) .....

Sept. 20—Exhibits to Deposition of Lenore G. King filed. (Marked to be opened only as directed by the Court) (Placed in safe) .....

Oct. 2—Notice fixing arg. on 10/31/73 at 9:30 A.M. before Weber, J. 109

Oct. 29—Deft's Further Amended Answers to Pltf's Interrogs (Fifth Set) filed 110

Oct. 31—Hearing held on Motion for Summary Judgment; Motion to Amendment of Memorandum Order on Pltf's Motion to Determine Class Action; Motion of Chamber of Commerce of U. S. for Leave to Participate as Amicus Curiae before Weber, J. and taken Cav. (Memo filed) (Rep: M. Cutright).... 111

Nov. 1—Affidavit of Sandra Wetzel filed 112

Nov. 16—Order entered fixing Conference of Counsel for 12/3/73 at 1:30 P.M. (Weber, J.) 113

Nov. 20—Letter dated 11/19/73 from Howard A. Specter, Esqr to Kalvin Grove, Esqr filed 114

Dec. 3—Notice, motion for reconsideration and proposed order filed by pltfs. 115

Dec. 3—Notice, motion for an order compelling discovery (production of documents) and proposed order filed by pltfs. 116

Dec. 3—Conference of Counsel held before Weber, J. and taken Cav. (Memo filed) (Rep: M. Cutright) 117

Dec. 4—Plft's Request for Production of Documents (Second Set) filed 118

Dec. 5—Notice, and Motion for Leave to Withdraw Request for Jury Trial with proposed order thereon filed by Pltfs 119

Dec. 5—Order entered Granting Motion to Withdraw Request for Jury Trial. (Weber, J.) .....

Dec. 6—Memorandum Order entered on Pending Matters directing that Order of 8/16/72 be amended; deft to respond to Pltf's motion showing cause by 12/17/73; deft shall produce for inspection any copying by Pltf's counsel all statements taken by the deft. (Weber, J.) 119A

Dec. 14—Notice of taking depositions of Frank L. Farwell 1/7/74 at 10 A.M.; John F. Robinson 1/10/74 at 10 A.M..; Raymond O. Hollis 2/11/74 at 10 A.M.; John P. Larrabee 2/13/74 at 10:00 A.M.; William A. Herrick 2/19/74 10 A.M. filed by pltf. 120

Dec. 17—Response of deft. to motion for an order compelling discovery filed 121

Dec. 17—Motion for reconsideration of that portion of the memorandum order of 12-6-73 pertaining to the production of statements from deft's employees filed by deft. 122

Dec. 19—Notice of service of interrogs to deft (Sixth Set) filed by pltf. 123

Dec. 26—Motion for order that deposition not be taken filed by deft. (deposition of Frank L. Farwell) 124

Dec. 27—Stipulation for extension of time for deft. to respond to pltfs' request for production of documents —second set and proposed order filed 125

Dec. 28—Order entered granting Stip. for Extension of time until 2/4/74 for deft. to respond to pltf's request for production of documents. (Weber, J.) .....

1974

Jan. 2—Letter dated 12/28/73 from Atty Specter to Judge Weber filed. 126

Jan. 8—Notice of Deposition of John F. Robinson on 1/24/74 at 9:30 A.M. filed by Pltf. 127

Jan. 9—Opinion filed and Order entered; deft found to have violated Civil Rights Act: violations of Title VII found in paragraphs 1, 2, 3 and 4 of Order have ceased as a matter of Company practice and no injunctive relief with respect to these issues is appropriate; the question of liability and appropriate relief for the issues of equal pay for equal work between male and female employees is reserved for further proceedings. (Weber, J.) 128

Jan. 9—Order entered fixing meeting of counsel for 1/24/74 at 3:30 P.M. (Weber, J.) 129

*Jan. 10—Supplement To the Brief of the Chamber of Commerce of the United States of America as Amicus Curiae. In support of the Deft. filed 129

*Jan. 10—Pltf's Brief in Support of Motion for Summary Judgment filed. (Transcript form) .....

*Jan. 10—Brief of the Chamber of Commerce of the United States of America. As Amicus Curiae in Support of the Deft filed 129D

*Jan. 10—Pltf's Reply Brief in Support of Motion of Summary Judgment filed 129E

*Jan. 10—Supplemental Brief of the United States Equal Employment Opportunity Commission as Amicus Curiae filed 129E

*Jan. 10—Brief On Behalf of the United States Equal Employment Opportunity Commission in Support of Pltf's Motion for Summary Judgment filed 129F

NOTE: THE ABOVE BRIEFS MARKED WITH * WERE STAMPED FILED BY JUDGE WEBER'S CLERK. 129G

Jan. 15—Notice, application for injunctive relief and proposed order filed by pltfs. 130

Jan. 17—Stipulation for extension of time for deft. to respond to interrogatories and proposed order filed .. 131

Jan. 17—Order entered extending time for deft to respond to interrogs until 2/20/74. (Weber, M) .....

Jan. 24—Deft's Answers to Pltf's interrogs (Sixth Set) filed. (Nos 1-41) 132

*Jan. 24—Notice of Appeal from Part of Order filed by deft. 133

Jan. 24—Copy of Notice mailed Court of Appeals; letter & copy to counsel and copy of notice given to Judge Weber .....

Jan. 24—$250.00 costs bond posted. (Surety-Fidelity & Deposit Company of Maryland) 133A

Jan. 25—Conference of Counsel held 1/24/74 before Weber, J. and concluded (Memo filed) (Rep: M. Cutright) 134

Jan. 29—Memorandum order entered directing deft. produce requested notes for inspection by court by 2/15/74; discovery stayed except discovery limited to equal pay issue; discovery on liability and damages in equal pay issue ends 4/15/74; pltf's pretrial narrative

due 4/23/74; deft's 4/30/74; parties shall stand ready for trial on the equal pay issue on or after 5/13/74 (Weber, J.) 135

Jan. 30—Copy of notice of service of interrogs. upon plts filed by deft. 136

Jan. 31—Transcript of hearing held 12/3/74 before Weber, J. filed (Rep. M. Cutright) 137

Feb. 1—Motion for reconsideration filed by deft. 138

Feb. 6—Notice. motion to compel answers to interrogatories and proposed order filed by pltfs. 139

Feb. 8—Motion for reconsideration of order allowing the equal pay issue to proceed as a class action filed by deft. 140

Feb. 15—Deft's Response to Pltf's Motion to Compel Answers to Interrogs filed. 141

Feb. 19—Motion filed and Order entered directing that time to file record in Ct. of appeals be extended to 3/18/74 (Weber, J.) 142

Feb. 19—Cert. copy of Motion and Order sent to Ct. of Appeals .....

Feb. 20—Memorandum filed and ORDER entered directing that final judgment be entered in favor of plaintiffs, that def's policy of requiring female employees to return to work within 3 mos. of delivery of child or be terminated is in violation of provisions of Title VII of Civil Rights Act of 1964; that def's policy of denying disability income protection plan benefits to female employees for disabilities related to pregnancies or childbirth are in violation of Title VII & directed that judgment entered for plaintiffs upon these claims of plfs' complaint. (Weber, J.) Motion for Reconsideration is denied. 143

Feb. 20—Pursuant to Memorandum filed and Order entered and Judgment by Decision of the Court filed by the Clerk Judgment is hereby entered accordingly of record. 144

Bernhard Schaffler, Clerk

Feb. 21—Pltfs interrog's to Deft with answers thereon. sixth set (Nos. 3, 4, 5, 6, 11, 21, 22 and 38) filed .. 145

Feb. 26—Original record mailed U. S. Court of Appeals..

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

SANDRA WETZEL and MARI ROSS, on behalf of themselves and all others similarly situated,
Plaintiffs,
vs.
LIBERTY MUTUAL INSURANCE COMPANY, a corporation,
Defendant.

Civil Action No. 72 169
Civil Rights Action

COMPLAINT

1. Jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1343(4); 42 U. S. C. § 2000e-5(f) and 28 U. S. C. §§ 2201 and 2202. This suit is authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964," 42 U. S. C. §§ 2000e et seq. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by (a) 42 U. S. C. §§ 2000e et seq., providing for relief against discrimination in employment and (b) 42 U. S. C. § 1981, providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States.

2. Plaintiff, Sandra Wetzel, is an individual residing at 1071 Lindendale Drive, Mt. Lebanon, Pennsylvania 15243.

3. Plaintiff, Mari Ross, is an individual residing at 1308 Pennnsbury Boulevard, Crafton, Pennsylvania 15205.

4. Defendant is a corporation which does business in the Commonwealth of Pennsylvania and the City of Pittsburgh. Defendant is engaged in the business of operating a liability insurance underwriting business. As such, it maintains and

operates offices throughout the United States. One of such offices is located at 717 Liberty Avenue in the City of Pittsburgh, Commonwealth of Pennsylvania.

5. Plaintiffs are female employees of defendant. Plaintiff, Sandra Wetzel, has been employed in the position of claim representative since Juiy, 1967. Plaintiff, Mari Ross, has been employed in the position of claims representative since January, 1970. Prior thereto, she was similarly employed from September, 1967, to April, 1968. At all times relevant hereto, plaintiffs and the other members of their class, have been discriminated against by defendant with respect to compensation, terms, conditions, privileges, and opportunities of employment and have been subject to those illegal acts, practices, and conduct alleged in Paragraph 11 of this Complaint.

6. Defendant is an employer within the meaning of 42 U. S. C. § 2000e-(b) in that it is engaged in an industry affecting commerce and, at all times relevant hereto, has employed at least 100 persons.

7. Plaintiffs bring this action on behalf of themselves and as representatives of a class as defined by Rule 23, Federal Rules of Civil Procedure. The class consists of all women currently employed or who, since July 2, 1965, have been employed by defendant in positions classified by defendant as "claims-technical", including, but not limited to the positions of claims representatives and supervisors. Plaintiffs are unable to state the exact number of the class without discovery of defendant's books and records, but aver on information and belief that the class exceeds two thousand members. The members of the class are so numerous as to make it impracticable to bring them all before the Court. There are liability and damage questions of law and fact common to the class which predominate over any questions affecting individual members only. Defendant has acted and refused to act on grounds generally applicable to the class.

8. The claims of the representative plaintiffs are typical of the claims of the class, and plaintiffs will fairly and adequately protect the interests of the class.

9. The prosecution of separate actions by individual members of the class would create the risk of:

(a) inconsistent or varying adjudications in different jurisdictions with respect to individual members of the class which would establish incompatible standards of conduct for defendant; and

(b) adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the members not parties to the adjudications, or substantially impair or impede their ability to protect their interests.

10. The class action is superior to other available methods for the fair and efficient adjudication of the controversy.

11. At all times relevant hereto, defendant has enacted and effected national policies and practices of unlawful and systematic exclusion of and discrimination against women as a class by *inter alia:*

(a) hiring women at lower rank and at lower pay than comparably trained and qualified men;

(b) failing to pay to women the same amount in salary raises as is paid to comparably trained and qualified men;

(c) failing to promote women to higher and better paying positions in the same manner and at the same rate as comparably trained and qualified men;

(d) paying wages to women employees at rates less than the rates at which it pays wages to male employees for equal work in jobs requiring equal skill, effort and responsibilities and which are performed under similar working conditions;

(e) failing to equalize conditions of employment for women as contrasted with comparably trained and qualified men;

(f) failing to make available to women certain positions, including, but not limited to, the positions of field adjuster, claims manager, assistant claims manager, and appraiser;

(g) adopting unreasonable, unwarranted and arbitrary standards and conditions of employment and advancement designed to discriminate in favor of men.

12. By letters of February 15, 1972, plaintiffs were notified, pursuant to Section 1601.25a(c) of Title 29 of the Rules and Regulations of the Equal Employment Opportunity Commission, of their right to institute this action.

Wherefore, plaintiffs pray judgment against defendant and in favor of plaintiffs and each member of their class:

(a) requiring that defendant establish non-discriminatory hiring, payment, opportunity, and promotional plans and programs;

(b) enjoining the continuance by defendant of the illegal acts and practices alleged herein;

(c) requiring that defendant pay over to plaintiffs and to the members of the class the damages sustained by plaintiffs and the members of the class by reason of defendant's illegal acts and practices, including adjusted backpay, with interest, and an additional equal amount as liquidated damages, and exemplary damages;

(d) requiring that defendant pay to plaintiffs and to the members of the class the costs of this suit and a reasonable attorneys' fee, with interest; and

(e) such other and further relief as the Court deems appropriate.

LITMAN LITMAN HARRIS & SPECTER

By /s/ (Illegible)
Attorneys for Plaintiffs

FINE, PERLOW, STONE & COHEN

By /s/ Robert F. Stone
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

* * (Caption—72-169) * *

ANSWER TO COMPLAINT

Pursuant to Rule 12(a) of the Federal Rules of Civil Procedure Liberty Mutual Insurance Company answers the Complaint filed against it on February 28, 1972 as follows:

1. It admits the allegations contained in Paragraph 1 of the Complaint.

2. It admits the allegations contained in Paragraph 2 of the Complaint.

3. It admits the allegations contained in Paragraph 3 of the Complaint.

4. It admits the allegations contained in Paragraph 4 of the Complaint.

5. It denies the allegations contained in Paragraph 5 of the Complaint.

6. It admits the allegations contained in Paragraph 6 of the Complaint.

7. It denies the allegations contained in Paragraph 7 of the Complaint and preserves until July 14, 1972 its further Answer pursuant to the order of the Honorable Gerald J. Weber entered in this cause on April 5, 1972.

8. It denies the allegations contained in Paragraph 8 of the Complaint and preserves until July 14, 1972 its further Answer pursuant to the order of the Honorable Gerald J. Weber entered in this cause on April 5, 1972.

9. It denies the allegations contained in Paragraph 9(a) and 9(b) of the Complaint and preserves until July 14, 1972 its further Answer pursuant to the order of the Honorable Gerald J. Weber entered in this cause on April 5, 1972.

10. It denies the allegations contained in Paragraph 10 of the Complaint and preserves until July 14, 1972 its further Answer pursuant to the order of the Honorable Gerald J. Weber entered in this cause on April 5, 1972.

11. It denies the allegations contained in Paragraph 11(a), (b), (c), (d), (e), (f) and (g) of the Complaint.

12. It does not have sufficient knowledge of the allegations contained in Paragraph 12 of the Complaint to admit or deny.

Pleading further, Liberty Mutual Insurance Company alleges as its affirmative defenses:

1. That pay differentials that are authorized under the Equal Pay Act of 1963 (29 U. S. C. Sec. 206(d)) are not a violation of Title VII of the Civil Rights Act of 1964. That under the Equal Pay Act of 1963 employees who are bona fide executive, administrative and professional employees are exempt from the provisions of the Equal Pay Act of 1963 and non-exempt employees cannot be compared to them to determine if a violation of the Act is present. Employees with the title of Division Claims Manager, Assistant Division Claims Manager, Adjuster and Appraiser are exempt under the provisions of 29 U. S. C. Sec. 213 (a)(1). Employees with the title of Claims Representative are not exempt under the provisions of 29 U. S. C. Sec. 213(a)(1).

2. That employees with the title of Claims Representative are performing functions which do not require in their performance the same skill, effort and responsibility as is required by the functions performed by employees with the title of Divisions Claims Manager, Assistant Division Claim Manager, Adjuster and Appraiser.

3. That employees with the title of Division Claims Manager, Assistant Division Claim Manager, Adjuster and Appraiser are performing functions in working conditions that are not similar to those in which employees with the title of Claims Representative are performing their functions.

4. That the amount of compensation paid to employees is based upon factors other than sex, including but not limited to skill, effort, responsibility and working conditions.

Wherefore, Liberty Mutual Insurance Company prays that because the Complaint fails to state a claim upon which relief can be granted, that said Complaint be dismissed.

Respectfully submitted,

LIBERTY MUTUAL INSURANCE COMPANY
By /s/ KALVIN M. GROVE
Kalvin M. Grove
LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602
312-641-0200

ROBERT A. PENNEY
175 Berkeley Street
Boston, Massachusetts 02116

CLEM R. KYLE
1305 Clark Building
Pittsburgh, Pennsylvania 15222

Dated: April 18, 1972.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Answer to Complaint was served by first class mail upon

Howard A. Spector
Litman, Litman, Harris and Spector
1320 Grant Building
Pittsburgh, Pennsylvania 15219

on April 18, 1972.

/s/ Illegible

Commonwealth of Pennsylvania
GOVERNOR'S OFFICE
HUMAN RELATIONS COMMISSION
Room 810—4 Smithfield Street
Pittsburgh, Pa. 15222
Tel: (412) 565-5395

July 1, 1971

Liberty Mutual Insurance Companies
717 Liberty Avenue
Pittsburgh, Pennsylvania 15222

Re: Docket E-4256
Wetzel and Ross vs.
Liberty Mutual Insurance Co.

Gentlemen:

This is to inform you that we have had a complaint filed with our agency by the above individuals. A copy of the complaint is enclosed for your review.

To expedite matters, we would like you to complete this interrogatory and return it to this office within fitfeen (15) days.

After we receive this form, an investigator from this office will be assigned to meet with you to gather facts pertinent to this case.

Your cooperation will be appreciated.

Sincerely yours,

/s/ SAMUEL J. KUBRICK
Samuel J. Kubrick
Compliance Specialist

SJK:gg
Enc.

Commonwealth of Pennsylvania
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

SANDRA WETZEL and MARI ROSS
(Complainant)

vs.

LIBERTY MUTUAL INSURANCE COMPANIES
(Respondent)

Docket No. E-4256

COMPLAINT

☒ Employment ☐ Housing ☐ Public Accommodations ☐ Education . . . Because of the ☐ Race, ☐ Color, ☐ Religious Creed, ☐ National Origin, ☐ Ancestry, ☐ Age, or ☒ Sex, of the complainant.

1. The Complainant here is Sandra Wetzel; One Dorchester Drive; Apartment 208; Pittsburgh, Pennsylvania 15241, and Mari Ross; 1308 Pennsbury Boulevard South; Pittsburgh, Pennsylvania 15205.

2. The Respondent herein is Liberty Mutual Insurance Companies; 717 Liberty Avenue; Pittsburgh, Pennsylvania 15222.

3. The Complainant alleges that the respondent maintains sex segregated job classifications and by so doing, limits female employees as a class to lower paying job classifications, and limits their opportunities for promotions and salary increments. The complainants further allege that female applicants, as a condition of hire, are subjected to inquiries about anticipated marriage and family size, while men are not similarly evaluated as a condition of hire.

4. The Complainant alleges that the alleged unlawful discriminatory practice:

☐ took place on or about _____.

☒ is of a continuing nature which has persisted up to and including the present time.

5. No other action based on these allegations has been instituted by the Complainant in any Court or before any other Commission within the Commonwealth of Pennsylvania except as follows:

☐ None

☐ _____

6. Such action complained of is a violation of:

☒ Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P. L. 744, as amended by the Act of February 28, 1961, P. L. 47 and as further amended by the Act of July 9, 1969, P. L. 133.

☐ Section _____ of the Pennsylvania Fair Educational Opportunities Act (Act of July 17, 1961, P. L. 776).

/s/ SANDRA WITZEL
(Signature of Complainant)
Date: 5-11-71

/s/ MARI ROSS
(Signature of Complainant)
Date: 5-11-71

Sworn to and subscribed before me this 11th day of May, 1971.

/s/ HELEN M. SNYDER
Notary Public

My Commission expires

IN THE UNITED STATES DISTRICT COURT

* * (Caption—72-169) * *

DEPOSITION OF KENNETH SPAULDING

TUESDAY, OCTOBER 17, 1972

The deposition of Kenneth Spaulding, witness herein, called by the plaintiffs for examination under the Federal Rules of Civil Procedure, taken before me, the undersigned, Dorothy Johnson, a Notary Public in and for the Commonwealth of Pennsylvania, pursuant to notice, at the offices of Litman, Litman, Harris & Specter, 1320 Grant Building, Pittsburgh, Pennsylvania, commencing at 10:30 o'clock a.m., the day and date above set forth.

[2] Appearances:

On behalf of the plaintiffs: Litman, Litman, Harris & Specter: Howard A. Specter, Esquire, 1320 Grant Building, Pittsburgh, Pennsylvania 15219

On behalf of the defendant: Kalvin M. Grove, Esquire, Chicago Title & Trust Building, 111 West Washington Street, Chicago, Illinois 60602

Robert A Penney, Esquire, Corporation Counsel.

INDEX

Witness: Page

Kenneth Spaulding

Examination by Mr. Specter 3, 84
Examination by Mr. Grove 83

Witness directed not to answer on Pages 17, 53, 68, 73, 74 and 84. Request for production of documents on Page 37.

[3] PROCEEDINGS

KENNETH SPAULDING witness herein, called by the plaintiffs for examination under the Federal Rules of Civil Procedure, having been first duly sworn, as hereinafter certified, was examined and testified as follows:

Examination By Mr. Specter:

Q. State your full name, please.
A. Kenneth D. as in David, Spaulding.
Q. Where do you live?
A. 20 Jeffrey Road, Wayland, Massachusetts.
Q. Have you ever testified before?
A. No.
Q. How long have you lived at that address?
A. Since 1960.
Q. With whom do you live there?
A. My wife.
Q. How old are you?
A. 60.
Q. What is your educational background?
A. I graduated from the University of Vermont in June of [4] 1934.
Q. In what field did you receive a degree?
A. I have a Bachelor of Science degree in Economics.
Q. Have you had any postgraduate training or studies in the field of economics since that time?
A. No, sir.
Q. Are you presently employed?
A. Yes, sir I am.
Q. By whom?
A. Liberty Mutual Insurance Company.
Q. In what capacity?
A. Manager, personnel services.

Q. Who is your immediate superior?

A. Melvin B. Bradshaw.

Q. What is his title?

A. Executive vice president.

Q. How long have you been employed by Liberty Mutual Insurance Company?

A. Since June 19th, 1934.

Q. Is that the first full-time employment you had after being graduated from college?

A. Yes, it is.

Q. Would you recite for me, the history of your employment [5] with Liberty Mutual, tell me what positions you held and where you held them and during what periods of time you held them?

You have heard this before, so you know what I want.

A. Claims training class, from June 19th until approximately the 1st of August. Then I was transferred—

Mr. Grove: What year?

The Witness: 1934, I am sorry.

A. Then I was transferred to Philadelphia and I was there until approximately April 1, 1937 as a claims adjuster and I was transferred back to Boston and I worked as a claims adjuster from that date until about September, 1937 when I became a supervisor in the Boston Claims Department.

I remained there until 1944 when I went to the home office as a home office claims examiner. I was there two years, approximately two years and a half.

Then I returned in the spring of 1946, I believe, to the Boston Claims then as the chief adjuster, the same job that is now known as assistant claims manager.

I became claims manager in the Boston Claims Office in 1949 until I was transferred to New York as administrative assistant in the New York Division and I remained there until April 1st, 1960 when I was transferred to the home office again in Boston as manager of personnel services.

[6] Q. And you have been manager of personnel services since April of 1960?

A. Correct.

Q. Is there a written job description for your job?

A. Apparently not. I thought there was but I couldn't find one.

Q. Why did you think there was?

A. Because I thought at the time of my transfer, there was an organizational bulletin put out that I was moving from New York to Boston and I thought there was something in there about it but that is not so.

Q. Would you tell me what duties and functions you performed as manager of personnel services?

A. Well, perhaps, I could start with telling you of the people who report to me, what they do.

Q. Okay.

A. One person reporting to me is director of company safety, safety director for the company. Another one is coordinator of benefit plans and he handles all of our benefit plans at the claim level.

Another one is director of supervisory training, responsible for the training of all of our nontechnical supervisory personnel. [7] In addition to that, I work with the various departments in those areas that are common to the company, if you will, rather than as departmental problems and affairs.

Q. Would you tell me what you do now?

A. I pursue those things I have just mentioned plus having some involvement with matters like the one now pending.

Q. Are you involved in all litigation in which the company is named party?

A. Yes, in this area, in the area of employee relations, not in the court area.

Q. Who is the company safety director?

A. Charles Butters.

Q. What does he do?

A. Well, in addition to being director of safety, he is also —oh, I forgot one person I must get back to—he also handles the interviewing of people who come into our home office in Boston looking for a job in the technical area who have not been recruited but just as we call it, wander in because we have a fair size building and we are in a relatively small city and they have heard of Liberty Mutual and they come in and he interviews them and he does that in connection with his job.

Also as director of safety, he is interested in such [8] things as safety of our people and the working condition of our people in the offices scattered throughout the country.

One person I forgot, James Brannon who is coordinator of equal employment.

Q. Who is the coordinator of benefit plans?

A. Paul Gately.

Q. What does he do?

A. Responsible for handling our comprehensive medical and income protection claims at the claims level.

Q. By that you mean claims being made on behalf of employees?

A. Well, yes, you know, their claims.

Q. As opposed to claims against the company from outside?

A. Yes. He has nothing to do with that.

Q. Does Mr. Gately report directly to you?

A. Yes, he does.

Q. Who is the director of supervisory training?

A. Norma M. Rodsater.

Q. What does she do?

A. Well, she is responsible through a group of people that we call training supervisors, there are some 38, 39 of them located in each of our divisions, for the most part assigned to the division offices and their function is to [9] travel and visit and inspect the offices within the division or within their area of command, to determine that we are providing our

technical staffs with the quality and quantity of clerical support that they need in order to get their work done.

Q. You mentioned your technical staff and the necessity of providing them with clerical support. What distinction does there exist in Liberty Mutual between jobs classified as technical and jobs classified as clerical?

A. Like most companies, we break our pay roll out as such into two broad classifications, clerical and technical. We chose that as opposed to some other designation.

Q. Is it your testimony that most large companies use those classifications?

A. Using some sort of classification rather than having a single pay roll. At least this is my experience. We think of the clerical people as those who have functions that they could do their work for anybody, not necessarily just limited to an insurance company, they would be a secretary in a law firm, in a department store. They are concerned with those areas that are peculiar to and are in pursuit to the insurance company, that is technical.

Q. You have rehabilitation nurses on your pay roll, do [10] you not?

A. No, I do not.

Q. Liberty Mutual does not—

A. Oh, I thought you meant on my pay roll in my department.

Q. No, with the company.

A. Yes.

Q. Are they classified as technical or clerical?

A. Technical.

Q. What do they do?

A. You would have to ask somebody in the claims department.

Q. You don't know what they do at all?

A. Well, in a very broad sense of the word, I know they are concerned with mostly seriously injured Workmen's Com-

pensation claimants but I don't know exactly what their duties are. I would have no occasion to know.

Q. What does Mr. Brannon do?

A. Mr. Brannon is a black man that is engaged in the recruiting of minority employees, devotes most of his time to recruitment at the campus level and various black organizations across the country such as the NAACP, Urban League and other agencies with which he is familiar and with whom he has contact.

[11] Q. Is there some reason that you pointed out the fact that Mr. Brannon is black?

A. Well, only because I thought you might be misled as to his name. That is a good Irish name.

Q. From what minority groups does he recruit employees?

A. Primarily black.

Q. What others?

A. Oh, Spanish surname.

Q. Any others?

A. I would not think so. Black men and women, Spanish surname men and women.

Q. Pardon?

A. The black—

Q. No. The last comment you made.

A. Black male and females and male and female Spanish surname.

Q. How long has he had that position?

A. On a full-time basis, I would think about 18 months.

Q. How about on a part-time basis?

A. Oh, about two or three years.

Q. What else did he do?

A. He was an underwriter.

Q. How long has he held the position of coordinator of [12] equal employment?

A. About a year and a half.

Q. What was his title before that?

A. Underwriter.

Q. Who was the coordinator of equal employment before him?

A. We didn't have one.

Q. Can you tell me with any precision, when that position was created?

A. No, I can't. The date, I would guess would be April, 1971.

Q. Are you able to tell me whether it was before or after Mrs. Ross and Mrs. Wetzel filed their charges with the Pennsylvania Human Relations Commission?

A. I can't be certain.

Q. Are you able to tell me whether it was before or after the New York City Commission began its investigation of employment practices?

A. No, I can't.

Q. Can you tell me whether it was before or after the Massachusetts Commission began its investigation?

A. No, I can't.

Q. Now, I have been told by numerous people including Mr. Grove, that you would be able to tell me the company's [13] maternity leave policies as they presently exist and as they have existed in the past.

Are you able to tell me the company's present policy with respect to maternity leave?

A. Yes.

Q. Please tell me.

A. Well, if a female employee has been employed with us one year and makes a written request for leave for pregnancy and her doctor verifies the fact that she is able to work and is pregnant and so forth, she is entitled to a leave of absence.

Q. For how long?

A. Leave of absence is six months from the date of termination or three months from the date of delivery, whichever comes first.

Q. And are those firm deadlines?

A. Yes.

Q. Is that without regard to whether there are any complications arising which for health reasons, preclude the employee from returning within that period of time?

A. Yes.

Q. Does the employee continue to accumulate benefits or seniority during the leave of absence?

[14] A. No.

Q. Are there any benefits or waiting periods or seniority points as it were, that are suspended during that period of absence?

A. When she returns from a leave, there is no three months waiting period as being employed at the beginning.

Also, she is returned to the same job or one comparable job. We don't think of it in terms of seniority.

Q. Is this leave of absence available only to female employees who have been with the company for a year or more?

A. That's correct.

Q. When was the present policy adopted?

A. Well, September, 1970, with a modification in November of 1971.

Q. What month in 1971?

A. September. I mean November of 1971. There was a modification in November of 1971.

Q. Tell me what the November, 1971 modification was.

A. Permitted to work through the ninth month or as long as the doctor said health-wise, she could.

Q. Prior to 1971, how long were your female employees permitted to work?

A. Through the eighth month.

[15] Q. How long had that been the policy?

A. Since 1967.

Q. September?

A. March.

Q. What was the policy prior to March of 1967?

A. Through the sixth month.

Q. How long was that the policy?

A. I can only go back to 1948. I could find no records earlier than that.

Q. Is it your testimony that the policy was the same from 1948 through March of 1967 or up until March of 1967?

A. That's correct.

Q. Now, was it always the policy that the employee received leave of absence during her absence from employment due to pregnancy?

A. No.

Q. When did that become a policy?

A. March, 1967.

Q. What was the policy prior to that?

A. Termination with re-employment if they returned to work with a waiving of the waiting period as far as benefit plans are concerned. They had to return for that privilege within six months.

[16] Q. Were they guaranteed re-employment?

A. No.

Q. Under what circumstances were they re-employed?

A. Well, if we had an opening when they applied for re-employment, we would take them back.

Q. At what point in time were they required to terminate their employment?

A. At that time, prior to 1967?

Q. Yes.

A. Six months or earlier if the doctor indicated.

Q. Were there any company-approved exceptions to that rule?

A. Not to my knowledge.

Q. Is the policy with respect to leaves of absence, has that been the same since March of 1967?

A. I'm sorry.

Q. Since March of 1967, has it been the policy of the company to give leaves of absence to pregnant employees?

A. Yes.

Q. And has the time period for returning been the same since that time?

A. Yes.

Q. So the only variable since March of 1967 is the period [17] during which the employee was permitted to work?

A. Yes.

Q. Tell me why the policy was changed in March of 1967.

A. On the advice of counsel.

Q. What counsel?

A. Home office.

Q. Who?

A. Mr. Penney.

Q. Can you tell me what advice you were given?

Mr. Grove: Don't answer the question.

Mr. Specter: State your reason.

Mr. Grove: Attorney-client privilege between Mr. Penney and Mr. Spaulding and between Mr. Penney and his client, the company.

Q. Why was the policy changed in September of 1970?

A. On advice of counsel.

Q. Same counsel?

A. Yes.

Q. Why was it modified in November of 1971?

A. On advice of counsel.

Q. Same counsel?

A. Yes.

Mr. Specter: Same objection if I pursue [18] it?

Mr. Grove: Same objection if you ask the same question.

Q. Are you familiar with the company's group life insurance program?

A. Yes.

Q. You were present at the deposition of Mr. Carr which was taken in this case, were you not?

A. Yes.

Q. In fact, you have been present at all of the depositions that have been taken so far?

A. Yes.

Q. You should have been a lawyer or you will by the time we finish.

I would like to show you what was marked at Mr. Carr's deposition as Carr Deposition 8A through G. On the first page, the one marked Carr Deposition Exhibit A, there is a statement that a change in the company's group life insurance program of the extension of the technical men's schedule to all technical personnel.

A. Yes.

Q. Can you tell me what that refers to?

A. Well, prior to January 1, 1967, our group life [19] insurance program contained three schedules. The basic schedule, technical men's schedule and a senior schedule.

The basic schedule is paid for entirely by the company. At the end of three months of employment, each and every employee received $1,000 worth of life insurance under the basic schedule.

At the same time, technical men which subscribed to the technical men's schedule received $2,000 of insurance on each of the succeeding ten anniversaries which they paid for entirely, so at the end of ten years and three months of employment, they would have a total of $25,000 in coverage, $22,000 under the technical men's schedule and $3,000 under the basic because the basic was increased to $3,000 in increments of $1,000 on each of the succeeding anniversaries after three months of employment.

Now, the senior schedule which is available to all employees requires ten years and three months of employment and everyone is eligible for it and this provides another $25,000 of insurance based upon salary ranges. Again, paid for entirely by the participants.

Q. So the there schedules are the basic schedule, technical men's schedule and the senior schedule?

A. Right.

[20] Q. And the latter two were paid for entirely by the participants?

A. Correct.

Q. Prior to January 1, 1967, was the technical men's schedule available to female employees?

A. No.

Q. Why?

A. Because it was a technical men's schedule.

Q. Can you tell me why it was limited to men?

A. Yes.

Q. Please tell me.

A. In Mass., in order to have a group life insurance plan, it is necessary that 75 per cent of the eligible people subscribe to the plan. At the time this plan was introduced in 1953, it was determined that we could not get 75 per cent participation if the schedule was made available to females, technical females.

Q. How was that determined?

A. I don't know.

Q. Who made the determination?

A. I don't know.

Q. Do you know whether any studies were done?

A. I don't.

[21] Q. Do you know whether anyone was asked?

A. I don't.

Q. Do you know if any technical female personnel were asked whether they would participate if invited?

A. I don't.

Q. Can you tell me why the policy was changed in January of 1967?

A. Advice of counsel.

Q. Same counsel?

A. Yes.

Mr. Specter: Same instruction?

Mr. Grove: Same instruction.

Q. In January of 1967, was there still a requirement that to have a group life insurance plan in Massachusetts, you had to have a 75 per cent enrollment?

A. Yes.

Q. And did you meet that requirement?

A. Yes.

Q. Have you met it ever since January 1st, 1967?

A. I don't know.

Q. Are you aware of any period during which you did not meet it?

A. No.

[22] Q. Is the requirement that there be an initial enrollment of 75 per cent or that a 75 per cent figure be maintained throughout the existence of the group?

A. I don't know.

Q. Are you able to tell me what percentage of your technical female employees participate in what we have been referring to as the technical men's schedule?

A. I cannot.

Q. Can you tell me who would be able to?

A. I don't know of anybody that would be able to tell you without—no, I don't, I don't know anybody.

Q. Are you aware of any way we could ascertain that information through a review of your records or otherwise?

A. I think so.

Q. Can you tell me how we could do it?

A. I honestly don't know. I know a couple of things I might check and that would be to see if the computer would spew it out.

Q. What else might you check?

A. I don't know. I would start there.

Q. Tell me, how do the employees make their payments, is it by pay-roll deduction?

A. Yes.

[23] Q. Who is the carrier for that group life program?

A. Liberty Life Assurance Company of Boston.

(Thereupon discussion held off the record.)

Q. So payments are made by pay-roll deduction?

A. Right.

Q. I take it you pay your employees by check?

A. Yes.

Q. Are they prepared by computer?

A. Yes, that is why I would start there.

Q. Is the pay-roll check accompanied by a check stub or a voucher of any kind?

A. Yes.

Q. What is it accompanied by?

A. I beg your pardon?

Q. What is it accompanied by, is it a stub?

A. No, it is the same size as the check, it lists all deductions.

Q. Does it list either by title or some code reference, the position held by the employee?

A. No.

Q. How about the department in which the employee works?

A. It must but I don't know. I think it must.

Q. It would certainly—

[24] A. I think it does.

Q. Okay. Is that schedule still called the technical men's schedule?

A. No. Technical employees' schedule.

Q. When was that changed?

A. 1-1-67.

Q. What annual salary must an employee be paid at the present time to be eligible for the senior schedule?

A. The same as before, the—oh, at the moment, right now?

Q. Yes.

A. We have abolished those two schedules, technical employees' schedule and senior schedule. They are no longer in existence.

Q. Technical employees' is no longer in existence?

A. Right.

Q. When was that abolished?

A. September, 1971.

Q. Why?

A. Because we changed our plan to a multiple of salary.

Q. Is that the same reason that the senior schedule was abolished?

A. Yes.

[25] Q. What salary range did one have to reach to be eligible for the senior schedule just prior to the time it was abolished in September of 1971?

A. I believe the minimum was $4,000. It went up in different steps to a maximum of 20.

Q. Is it your testimony then that the amount of coverage available under the senior schedule depended upon the salary of the particular employee?

A. That's correct. After ten years and three months of employment.

Q. How long prior to September, 1971, did you have that basic life insurance program in effect?

A. Do you mean with the basic schedule?

Q. With the three schedules.

A. The technical employees' schedule—

Q. All of them.

A. Since July 3rd, 1953 or July 1. I think it is the 3rd.

Q. How was your group life program changed in September of 1971?

A. Changed to a multiple of salary.

Q. Explain how that works.

A. Two-and-a-half times salary, rounded to the nearest thousand dollars, maximum of $150,000 in coverage, not salary.

[26] Q. Who pays for that coverage?

A. The company and the employee.

Q. Who pays how much?

A. Company pays 60 per cent and the employee pays 40 per cent. The company still pays for the first $3,000 of coverage in full.

Q. Does Liberty Mutual have a mandatory retirement age?

A. Yes.

Q. What is it?

A. 65.

Q. Does that apply to all employees?

A. Yes.

Q. Has that always been the case?

A. Since 1934. I don't know what it was prior to that.

Q. Does Liberty Mutual have an income protection plan?

A. Yes.

Q. Would you describe it for me?

A. Those people who have been with us less than five years and more than three months for disability extending beyond the eighth day, calendar day, disabled employee will receive income protection benefits under an insured plan for 103 weeks. The first week of that disability is paid for in full by the company.

[27] The insured benefit is two-thirds of salary to a maximum of $150 a week.

Salary supplement that pays half the difference for as many weeks as years of completed service.

But people who have been with over five years, they receive two-thirds of their salary to a maximum of $275 a week.

To age 65, same salary supplement paying one-half of the difference between the insured amount and full salary for as many weeks as years of completed service.

There are offsets on the both of these plans, Social Security benefits or Workmen's Comp. benefits.

Q. Does the income protection plan cover disability related to pregnancy?

A. No.

Q. Are there any other disabilities that it doesn't cover?

A. Any disability that is not established by medical evidence.

Q. Any other?

A. I can't think of any.

Q. Can you tell me why it doesn't apply to pregnancy?

A. On advice of counsel.

Q. Same counsel?

[28] A. Same counsel.

Mr. Grove: Same objection.

Q. In computing the waiting period of five years and three months that you referred to earlier, do you include periods of leaves of absence due to pregnancy?

A. May I ask you a question?

Q. Yes.

A. Are you talking about—income protection plan, is this what you are referring to?

Q. That is a five-year waiting period, is it?

A. No. We have three year income protection plan if you have been with us more than three months and less than five years.

And the long-term disability which can run from maybe age 30 to 65, would begin after five years of employment.

Q. In computing the five years of employment, do you include periods during which a female employee is absent due to pregnancy?

A. If she is on a pregnancy leave of absence, yes.

Q. How long has that been your policy?

A. Since we established the pregnancy leave.

Q. I take it that when your policy was to require a pregnant female to terminate her employment, you did not [29] include in your computation of waiting periods, any time between the date of termination and the date of re-employment if the employee was—

A. They start that when they are re-employed except we waive the three-month waiting period.

Q. If I understand you correctly, if you had a female employee who was in your employ for ten years, she became pregnant, she would have been required to terminate her employment?

A. Correct.

Q. Then if she reapplied for employment and there was a position available and she was rehired, she would have lost whatever time had accrued under your income protection plan?

A. That's correct.

Q. Are you aware of any areas of employee benefits offered by Liberty Mutual where the benefits afforded to male employees are not the same as those afforded to female employees?

A. I am not.

(Thereupon discussion held off the record.)

Q. Are you aware of the policy of Liberty Mutual Insurance Company not to hire as claims adjusters or claims representatives, persons who had similar experience with other [30] insurance companies?

A. I heard it, I have heard of that.

Q. Where did you hear that?

A. Well, I don't know. Maybe it was one of these depositions.

Q. If I were to tell you that Mr. Grove made the statement at Mr. Raymond's deposition, would that ring a bell?

A. It wouldn't surprise me if that is where I heard it but I am sure I heard it before that. I don't know when or where.

Q. With the exception of claims representative and claims adjuster, are you aware of any other positions for which Liberty Mutual Insurance Company does not hire persons who have had similar experience with other insurance companies?

A. No.

Q. Does Liberty Mutual Insurance Company have a form of employment application which it uses throughout the country?

A. No.

Q. Did it ever?

A. Not to my knowledge.

Q. Do you know whether Liberty Mutual Insurance Company maintains records of the time worked by its employees for which it pays overtime?

[31] A. Yes.

Q. Where are those records maintained?

A. They eventually find their way to the division office where they are maintained by the administrative manager of each division. I don't know how long they are kept in each local office.

Q. Are there also records maintained at the home office?

A. For home office employees, yes, by the administrative manager in the home office.

Q. Tell me what form the records of overtime take.

A. It is a time slip, we call it a record of time slip. I believe we call it that.

Q. Under what circumstances is that slip completed?

A. By or for all nonexempt people.

Q. But when is it completed? Is it only completed when they work overtime? Is one completed every pay period?

A. Every pay period.

Q. Without regard to whether overtime is worked?

A. Correct.

Q. That is for all employees who are not exempt?

A. Yes.

Q. Everywhere in the country?

A. That is my understanding.

[32] Q. So then if a nonexempt employee works no overtime, a time record slip is prepared reflecting that fact?

A. No. I think in that instance, I could be wrong, but I believe in that instance it is prepared by the supervisor who records no overtime for the unit, lists the names and signs them. I believe this is done in some offices or some jurisdictions because there are some State laws superimposed upon the Federal

Wage and Hour Law that requires us to keep the forms in a little different fashion.

Q. Do you know how it is done here in Pittsburgh?

A. No.

Q. Can you tell me for which positions in the technical area of the claims department these time record slips are prepared?

A. Well, for nonexempt people.

Q. Tell me which ones they are.

A. All the clerical people—

Q. I am talking about the technical people only.

A. Oh. CR's.

Q. Which others?

A. Adjusters during the training period up until such time as they become exempt.

Q. Any others?

[33] A. Not to my knowledge. There could be but I don't know of any.

Q. Then to the best of your knowledge, Liberty Mutual treats only claims representatives and adjuster trainees as non-exempt technical personnel?

A. That's correct.

Q. When does a claim adjuster become exempt?

A. Whenever the department exempts them. I don't know when that is.

Q. Who would know?

A. Mr. Carr would know.

Q. Okay.

A. He prepares the exemption card or someone on his staff.

Q. Do you know what criteria are applied in determining when an adjuster becomes exempt?

A. I assume when he is finished his training, sometime beyond that.

Q. At least there is some period of time during which adjusters are not considered as exempt employees by Liberty Mutual Insurance Company?

A. That's correct.

Q. That is at least during the training period?

A. That's correct.

[34] Q. Which is a minimum of a six-week program?

A. I believe a minimum of six.

Q. Have you been told whether salary is one of the criteria that is applied in determining whether an adjuster is treated as exempt by Liberty Mutual Insurance Company?

A. No more than any other job where salary would be a criteria, under the Wage and Hour Law.

Q. I am asking you whether you have been told whether it is considered at all.

A. No, I don't think so. You mean as the definite criteria?

Q. No, one of the criteria.

A. Oh, sure.

Q. You have been told that?

A. Yes.

Q. Are you aware that it is one of the criteria?

A. Yes.

Q. Is it your understanding that until a claim adjuster reaches a certain salary level, he is not treated as an exempt employee by Liberty Mutual Insurance Company?

A. He would have to qualify salary-wise.

Q. So adjusters who do not qualify are not, salary-wise that is, they are not considered exempt employees by Liberty [35] Mutual?

A. I would assume so.

Q. Is that your understanding?

A. Yes, if they don't meet the salary qualification.

Q. Have you been told that by anyone?

A. Pardon?

Q. Have you been told that by anyone?

A. Not in that context.

Q. Okay. Are any of the clerical employees considered or treated as exempt employees by Liberty Mutual Insurance Company?

A. No.

Q. Are you familiar with the form which has been used by Liberty Mutual Insurance Company which is numbered PERS, for personnel, I assume, 195-R5.

A. Not by number.

Q. Are you familiar with the exemption form, a copy of which was marked at Mr. Penney's deposition?

A. The green card?

Q. Right.

A. Yes.

Q. Just so the record is clear, I'll show you what was marked as Penney Deposition Exhibit No. 1 and ask you to tell [36] me if that is a copy of the green card you have referred to.

A. Yes.

Q. How long has that card been used by Liberty Mutual Insurance Company?

A. I have no idea.

Q. How long, to your knowledge, has it been in use, when is the first time you became aware of its use?

A. I don't know.

Q. Is it still in use?

A. Yes.

Q. Are you familiar with the Personnel Policies and Procedures Manual referred to on the green exemption card?

A. Yes.

Q. Can you tell me the names of those persons who have a copy of them?

A. No.

Q. Would Mr. Raymond have one?

A. I don't know.

Q. Can you tell me whether that would be a manual that Mr. Raymond referred to at his deposition?

A. I don't remember, unless you can read me what he said.

Q. Page 40, the question was asked, I'll show this to Mr. Grove—to your knowledge, Mr. Raymond, does Liberty [37]

Mutual have any manual describing Liberty Mutual's personnel policies and then there is an objection and some conversation between Messrs. Brown and Grove and the response is, yes, there is a manual, personnel manual applying to all departments.

A. That is what he was referring to.

Mr. Specter: Mr. Grove, do you have any objection to producing that when you produce Mr. Raymond?

Mr. Grove: Not if he has it.

Mr. Specter: As of April 5, 1972, he had it.

Mr. Grove: He said there was one in the office, he didn't say he had it.

Mr. Specter: Will you produce it if it is in the Pittsburgh office?

Mr. Grove: If he is available.

(Thereupon discussion held off the record.)

Q. You don't have a copy with you?

A. I do not, no.

Q. You do have a copy of the manual, however, I take it?

A. Oh, yes.

Q. Are those manuals supplemented from time to time?

A. Yes.

[38] Q. Are they loose-leaf?

A. Well, it is in a Acco base binder.

Q. I would like you to look at what was marked at Mr. Phillips' deposition as Phillips' Deposition Exhibit No. 1, please take your time and read that.

A. Yes.

Q. Can you identify it for me?

A. Yes, I wrote it.

Q. That doesn't identify it.

A. Memorandum addressed to the administrative managers and the subject is Federal Wage and Hour Law-Payment of Overtime, dated March 30th, 1970.

Q. Do you remember writing it?

A. No. I remember I wrote it, though.

Q. Do you remember the circumstances under which you wrote it?

A. No.

Q. Are you familiar with the policy described in the memorandum?

A. Yes.

Q. Incidentally, are supervising claims representatives treated as exempt employees by Liberty Mutual Insurance Company?

[39] Your memo indicates as of March 30th, 1970, supervising claims representatives and claims representatives supervisor were treated as exempt employees.

A. Yes.

Q. That is two-and-a-half years ago?

A. Yes. Oh, you mean presently, currently?

Q. Yes.

A. Yes, as far as I know.

Q. Now, were you aware as of the date of your memorandum, that—strike.

Tell me what efforts were made by Liberty Mutual Insurance Company to advise claims representatives who had been treated as exempt employees prior to March 15th, 1970, that after that date, they would be entitled to overtime pay for any overtime worked.

A. I don't know.

Q. Do you know whether there were any?

A. I do not.

Q. Who would know?

A. Mr. Carr, some member of his staff.

Q. Do you know why the position was changed to an exempt position in March of 1970?

A. Yes.

[40] Q. Tell me why.

A. Advice of counsel.

Q. Did you discuss that matter with counsel?

A. I think I probably did. I have no recollection of such a conversation but I think I probably did.

Q. How do you know it was on advice of counsel?

A. Responsibility of counsel to determine which jobs are classified as exempt and nonexempt.

Q. Do you have personal knowledge of that?

A. Yes.

Q. Who advised you that the position should be declassified?

A. Counsel.

Q. To what department, if any, is counsel attached?

A. Home office legal department.

Q. In March of 1970, was counsel attached to the home office claims department?

A. No.

Q. Now, your memorandum states that the home office claims department has informed us, et cetera. Can you tell me who in the home office claims department, if anyone, you were referring to?

A. Either Mr. Carr or Mr. Phillips, I don't remember [41] which.

Q. Can you tell me what either or both of those gentlemen told you about the declassification?

A. Not beyond what is in the memorandum.

Q. Were you present at that part of Mr. Carr's deposition when he testified that around August of 1971, there was a decision made to actively recruit claims representatives as claims adjusters?

A. Yes.

Q. Now, were you familiar with that decision prior to the time that you heard Mr. Carr testify about it?

A. I knew of it.

Q. Pardon.

A. I knew of it, yes.

Q. When did you first learn of it?

A. I would guess about the time the decision was made.

Q. Do you recall learning of it?

A. Not as a specific event.

Q. What was the first thing you heard about it?

A. I don't remember.

Q. Who was the first person to tell you about it?

A. I don't remember.

Q. What is the first recollection that you do have [42] concerning that subject?

A. I guess a discussion involving Mr. Carr and Mr. Phillips. I don't remember when or where, whether in Mr. Carr's office or my office.

Q. But you do recall it was in Boston at the company's office?

A. Yes.

Q. Can you tell me whether it was prior to September of 1971?

A. I think so.

Q. Okay. Can you tell me whether it was before the final decision to actively recruit claims representatives was made?

A. No.

Q. No, you can't tell me or no, it wasn't it?

A. I don't know.

Q. Were you consulted in any way concerning that decision, was your advice solicited?

A. No.

Q. No one asked your opinion about it?

A. No.

Q. Do you know whether it was before or after Mrs. Wetzel and Mrs. Ross were offered the position of claims adjuster?

[43] A. My memory is that it was before but I can't be sure.

Q. Would you tell me everything you recall about that discussion?

A. The recollection that I have at the moment is that it would be determined we would offer qualified CR's to become reclassified as claims adjusters.

(Thereupon the record was read.)

Q. Have you heard your answer read back?

A. Yes.

Q. Now I take it from that that the decision to offer the reclassification as you put it to qualified CR's had already been made by the time of this conversation and I ask that because you say that the only recollection you have is that it had been determined.

A. I am trying to remember. I might very well have been in on some of the preliminary discussions leading up to this decision but I have no recollection of it.

Q. If you were in on any of those preliminary discussions, if there were any, would you have a record of them?

A. No.

Q. Do you have any record of this discussion that you have just mentioned?

A. No.

[44] Q. You have no recollection of this meeting?

A. Meeting or meetings, I don't know.

Q. What is the next recollection you have concerning the decision to recruit CR's as claims adjusters?

A. I don't have any.

Q. Were you involved at all in implementing or carrying out that decision?

A. No.

Q. Can you tell me what steps Liberty Mutual Insurance Company took to communicate to its claims representatives throughout the country the fact that that decision had been made?

A. No.

Q. Do you know whether there were any such steps?

A. No.

Q. Do you know that there were not?

A. No.

Q. Are you familiar with the duties performed by claims representatives?

A. No.

Q. Are you familiar with the duties performed by claims adjusters?

A. No.

[45] Q. So if I were to ask you to compare or contrast those two positions, you wouldn't be able to do it, is that right?

A. Based upon what I have heard in these depositions, but if you are asking my personal knowledge today, what an adjuster does and what a CR does—

Q. You don't know?

A. I don't know. I know what they did 18 or 20 years ago, an adjuster, but—

Q. You have also been present at depositions where there has been testimony concerning interviews of claims representatives for the purpose of considering them for the position of claims adjuster, is that right?

A. There has been testimony about this.

Q. Yes. You heard that testimony?

A. Yes.

Q. Now, what I want to know is prior to hearing the testimony, were you aware that those interviews had been conducted or that they were being conducted?

A. Yes.

Q. You are aware then that at some point, the decision was made to determine which of Liberty Mutual's claims representatives were qualified to perform as claims adjusters?

A. Yes.

[46] Q. When did you learn of that decision?

A. I don't know.

Q. What is the first recollection you have of that decision?

A. At the time that I became aware of the fact that they had decided to offer qualified claims representatives reclassification as claims adjusters.

Q. Was it at that time that you also learned they were going to review the various claims representatives for that purpose?

A. Yes.

Q. Was that at the same meeting that you had referred to earlier?

A. I can't say it was at the same meeting but I believe it was about the same time.

Q. Then that is something that you forget to tell me earlier when I asked you your recollection of the decision to recruit claims representatives.

A. I thought you were talking about the decision that they would do it, not about that part of it, but I am sorry if I overlooked it. No intention to.

Q. Can you tell me what steps were taken to determine which of the claims representatives would became claims [47] adjusters?

A. No.

Q. You have no personal knowledge of that other than what you have heard at depositions?

A. That's correct.

Q. Other than what you have heard at depositions, are you able to tell me how many claims representatives were offered the position of claims adjuster?

A. I can't.

Q. Are you able to tell me from what—strike.

Are you able to tell me from your personal knowledge or from what you have been told by anyone at Liberty Mutual, how the salaries of claims representatives were affected when they became claims adjusters?

A. No.

Q. You have never been told?

A. No.

Q. Do you know whether they started as claims adjusters at the prevailing salary for claims adjusters?

A. No, I don't from my own knowledge.

Q. Have you been told?

A. I don't know whether I was or whether I assumed that they did. I don't know.

[48] Q. You are the person who has custody of the personnel files of the various Liberty Mutual personnel, is that right?

A. Technical only.

Q. Technical only?

A. Yes.

Q. Can you tell me what materials are in those files, by subject matter?

A. It varies by department but generally we have in those jackets—

Q. Let's limit ourselves now to the claims representatives.

A. We would have a copy of the application, a copy of the reference material or the original of the references, original of the application, what we call a notice of personnel change which is created whenever the position is changed or the office is changed or the name is changed of an employee, we would have the employment copy as well as a termination copy for terminating employees.

That is about what we would have on an active file. I can think of no other information that would be in all of the jackets.

Q. How about the periodic reports—

A. We don't get those.

[49] Q. Where are those kept?

A. Home office.

Q. You are in the home office?

A. Home office claims department.

Q. Do you know what is in those files?

A. I do not.

Q. You are aware that certain claims representatives were offered the position of claims adjuster, is that right?

A. Not by name.

Q. But you know that certain—

A. There was a group of them.

Q. You know that certain various claims representatives were offered the position?

A. Yes.

Q. And you know that certain of them accepted the position and some did not accept the position?

A. I have been told that.

Q. Do you know whether the fact that the position had been offered, would be contained in the personnel file that you have or that the claims department has for the various claims representatives?

A. No, wouldn't have a record of those that were offered the opportunity to become—

[50] Q. Do you know whether there is such a record?

A. I do not.

Q. Have you been told?

A. I have not.

Q. You are aware also that—strike.

You are aware statements have been taken from various claims adjusters and claims representatives?

A. Yes.

Q. Do you know whether copies of those statements are in the files of the employees?

A. Not in mine. Not in the personnel jackets in my custody.

Q. Do you know whether they are in the others?

A. I don't.

Q. Have you been told?

A. I have not.

Q. When did you first learn that those statements were going to be taken or that they had been taken?

A. I have no idea.

Q. You don't know whether you knew in advance that they were going to be taken?

A. I don't.

Q. Have you seen those statements?

[51] A. Yes.

Q. Have you read them?

A. Yes, some of them.

Q. How many?

A. I don't know. I would guess five, ten.
Q. Can you tell me why you read them?
A. I guess because they were given to me and I read them.
Q. By whom were they given to you?
A. I don't know. Dan Phillips, I guess.
Q. Do you know why they were given to you?
A. Well, in connection with this.
Q. Did you read all of those that were given to you?
A. No.
Q. Were they all given to you?
A. No.
Q. Approximately how many were given to you?
A. 15, maybe.
Q. Can you tell me who took the statements that you read?
A. Larrabee, Jack Larrabee and Bill Herrick.
Q. Did the statements of Mr. Larrabee follow the same format?
A. Well, they were written statements without a form or anything, just a written statement.
[52] Q. I understand that.
A. I don't think there is any particular format. I don't understand really what you mean.
Q. Were you able to tell that the statement consisted of responses to various questions?
A. Oh, yes.
Q. And was it generally true that the same questions were being answered in each of the statements?
A. In general.
Q. Was it generally true that the same questions were being answered in the same order in each of the statements?
A. I can't recall that.
Q. In whose handwriting were the various statements?
A. I don't know.
Q. Were they in the same handwriting?
A. No.

Q. That is all of Mr. Larrabee's statements?
A. I think so. I am not acutely aware of the handwriting.
Q. Is it also true that the same questions were being answered in the statements taken by Mr. Herrick?
A. As in Mr. Larrabee's?
Q. Well, let's restrict ourselves to Mr. Herrick's.
A. Yes, I think so, followed the same general thing.
[53] Q. Did the statements taken by Mr. Herrick follow the same general theme as the statements taken by Mr. Larrabee?
A. I would think so.
Q. That is your recollection?
A. Yes.
Q. Now, were the statements that you read, taken from claims adjusters only?
A. I don't know. I don't remember.
Q. What subject matters were covered in these statements?
Mr. Grove: Don't answer the question. Same reason as I stated in Boston. It was prepared at my request and Mr. Penney's request and we claim they are attorney work products. You have a motion pending for their production right now plus the fact that obviously what Mr. Spaulding could tell you would be secondary evidence.
The statements themselves are the best evidence and since you have a motion to produce, I suggest we restrict it to that. We'll respond to that.
Q. Mr. Spaulding, you are familiar with the Want A Job Fit For A Queen brochure, are you not?
A. I have seen it.
Q. You were present at the deposition when I asked who [54] prepared it, weren't you?
A. Yes.
Q. Do you know who prepared it?
A. I do not.
Mr. Specter: Mr. Grove, you undertook to find out who prepared it and when it was in use and whether it is in use now?

Mr. Grove: Mr. Specter, I know it is not in use. When it was in use, I have not yet determined and I have not even come anywhere close to finding out who the author of it was. No one seems to know.

Q. Do you know how the form was used, Mr. Spaulding?

A. No, I do not. I had nothing to do with it.

Q. Other than what you have heard at the depositions, do you have any knowledge about this form?

A. No.

Q. You were present during the testimony to the effect that at some point in 1970 or 1971, the home office began to receive feedback to the effect that claims representatives were interested in the position of claims adjuster?

A. Yes.

Q. Now, other than what you have heard at depositions, [55] do you have any information about that feedback?

A. No, I don't

Q. Were you aware of that prior to the deposition?

A. No.

Q. You know, you have also heard testimony that women didn't appear to be interested in the position of claims adjuster and men didn't appear to be interested in the position of claims representative. Do you have any knowledge or information concerning those statements?

A. None whatsoever.

Q. So you wouldn't be able to tell me whether those were accurate observations or not?

A. I would not.

Q. Now, I understand from earlier testimony that you are the individual who answers or at least receives inquiries concerning former technical employees of Liberty Mutual Insurance Company, is that correct?

A. Former employees?

Q. Yes.

A. They come to my department, not me personally.

Q. Who receives the questions for former clerical employees?

A. They go to the office in which the person worked, [56] generally, but they are forwarded to the administrative manager in the division.

Q. Who answers them?

A. The administrative manager.

Q. What level are reference requests concerning former technical employees answered?

A. At the home office level, my department.

Q. But not by you personally?

A. That's correct.

Q. Do you approve the responses or do you see them before they go out?

A. I do not.

Q. How long has it been the practice for the reference requests concerning former technical employees to come to your department?

A. Well, they came to the home office to be answered by a department that existed prior to the establishing of the personnel services which was established in 1960.

Prior to that time, we had a department known as personnel policy and research which went out of existence and as near as I can tell, that goes back into the '40's and I don't know how much sooner than that.

Q. Do you know why it is the practice to direct reference [57] requests for former technical employes to the home office rather than to the various divisions?

A. Yes, because the divisions don't have the technical personnel jackets. They are maintained in the home office.

Q. Have you ever met Sandra Wetzel?

A. Yes.

Q. When was the first time?

A. I think it was August of 1971. Yes, August of 1971, I believe.

Q. Where did you meet?
A. Pittsburgh, our office.
Q. Who else was present?
A. Mr. Penney.
Q. Anyone else?
A. Mrs. Ross.
Q. Was that also when you first met Mrs. Ross?
A. Yes.
Q. I take it you met them together, then?
A. Yes.
Q. When was the next time you met them?
A. Either of them?
Q. Yes.
A. Yesterday.

[58] Q. Since the summer of 1971, you have not personally seen either Mrs. Wetzel or Mrs. Ross, is that right?

A. Last Friday, I was on the elevator at the 12th floor and I stopped at the 10th and I think I saw Mrs. Wetzel standing in the lobby. I am not sure.

Q. That would be the only time?

A. Yes.

Q. Would you have some record of the date on which you first met Mrs. Wetzel and Mrs. Ross?

A. The only one I could think of would be my expense account or my last year's diary.

Q. Who introduced you to Mrs. Wetzel and to Mrs. Ross?

A. Mr. Penney.

Q. Do you know whether he had met them prior to that time?

A. I believe he had.

Q. Did he tell you that he had?

A. Yes.

Q. Under what circumstances did he tell you he had met Mrs. Wetzel and Mrs. Ross?

A. I don't know that I understand what you mean.

Q. Did Mr. Penney tell you the circumstances under which he met Mrs. Wetzel and Mrs. Ross?

[59] A. In connection with the complaint to the Pennsylvania Commission.

Q. Do you know when Mrs. Wetzel and Mrs. Ross were told they were going to meet you?

A. No.

Q. What was the purpose, if there was one, of your meeting Mrs. Wetzel or Mrs. Ross?

A. The purpose was, Mr. Penney was going to discuss their complaint with them.

Q. What was the purpose of Mr. Penney's first meeting with them?

A. I assume it was in connection with their complaint.

Q. You were not there?

A. Right.

Q. Can you tell me why you were there at this other meeting?

A. I guess because—I was there because I was there, I guess.

Q. What were you supposed to do there?

A. I didn't do anything.

Q. I didn't ask you what you did. I asked you what you were supposed to do.

A. Accompany Mr. Penney.

[60] Q. And listen to what was said?

A. Yes.

Q. For some particular purpose?

A. No, except this is in my general area of interest and responsibility, complaints against the company.

Q. Did you say anything to either Mrs. Ross or Mrs. Wetzel during the course of the meeting?

A. Other than to acknowledge the introduction, I have no memory of saying anything to either one of them except to say good-bye.

Q. Is it your recollection that you did not say anything?

A. Yes.

Q. How long did that meeting last?

A. It was brief. I would think not over 15 minutes.

Q. Was there any time during the meeting that Mrs. Wetzel and Mrs. Ross were not both present?

A. No.

Q. Was there any time during the meeting that the four of you were not all present, that is you, Mr. Penney and Mrs. Ross and Mrs. Wetzel?

A. No.

Q. Where at your Pittsburgh office did the meeting take place?

[61] A. My recollection is on the 16th floor, claims training classroom.

Q. Did you make any notes concerning that meeting?

A. I did not.

Q. Do you know whether Mr. Penney did?

A. I do not.

Q. Tell me everything you remember about that meeting.

A. I recall Mr. Penney telling them that the company would not do certain things that they are asking. One was to pay them the same amount of money as was being paid to claims adjusters.

I recall that he offered them the opportunity to be reclassified as claims adjusters.

Q. What else do you remember?

A. That is it, as far as I know, as far as I can recall.

Q. You say that Mr. Penney told Mrs. Wetzel and Mrs. Ross that the company would not do certain things, is that right?

A. Yes.

Q. One of those things was pay claims representatives the same as claims adjusters?

A. Right.

Q. Were there any other things he said the company would not do?

[62] A. I don't know. I don't remember anything else.

Q. Did Mr. Penney offer to pay Mrs. Wetzel back pay?

A. No.

Q. Did he offer Mrs. Ross back pay?

A. No.

Q. Tell me to the best of your recollection, just what Mr. Penney said when he offered the position of claims adjuster to Mrs. Wetzel and Mrs. Ross.

A. I think I have.

Q. Well, tell me again.

A. He said that he would offer them the opportunity to be reclassified as claims adjusters.

Q. Well, did he say anything about their qualifications for the position?

A. Not to my recollection.

Q. Did he say that their work had been reviewed?

A. I don't remember.

Q. Did he say that the company felt they could do the job?

A. I think he must have but I have no definite recollection of the words he used or written notes of the conversation itself but I think he probably did.

Q. You are positive that he used the word reclassified?

[63] A. That is my memory.

Q. Do you have a specific recollection of his saying that?

A. Yes, I think I do.

Q. Did he extend the offer to Mrs. Wetzel and Mrs. Ross simultaneously?

A. Yes.

Q. Was there any discussion of the complaints that Mrs. Wetzel and Mrs. Ross had?

A. No, not by Mr. Penney.

Q. By anyone?

A. My recollection is, it was testified yesterday that Mrs. Ross and Mrs. Wetzel, they referred to the fact that the opportunity to become claims adjusters was not the whole basis of their complaint.

Q. It is your recollection that they did say that?

A. Yes.

Q. When you came to Pittsburgh to meet with Mrs. Wetzel and Mrs. Ross, did you know that Mr. Penney was going to offer them the position of claims adjuster?

A. Yes.

Q. So when you told me that the purpose of the meeting was for Mr. Penney to discuss their complaints, that was not [64] the whole purpose of the meeting?

A. That was their complaint.

Q. That was one of their complaints, was it not?

A. Yes.

Q. You knew that was not their only complaint, didn't you?

A. Well, I knew that their complaint, as far as I was concerned at that time, I understood their complaint to be they wanted to be outside claims adjusters and they felt the CR's should be paid the same amount of money as outside claims adjusters. That was my understanding of their complaint at the time we visited them in Pittsburgh.

Q. Prior to your meeting in Pittsburgh, had you read the complaint that was filled with the Pennsylvania Human Relations Commission?

A. I am sure I did. I have no recollection when but I am sure I did.

Q. Did Mr. Penney tell Mrs. Wetzel and Mrs. Ross at that meeting that—strike.

At that meeting, did Mr. Penney tell Mrs. Wetzel and Mrs. Ross anything about the company's attitude toward women generally as claims adjusters?

A. I think he may have said something to the effect that the company felt that the job of claims adjuster was not [65] ideally suited to women.

Q. Is it your recollection that he said that?

A. Something to that effect, yes.

Q. Did he go into any detail, did he say why it wasn't suited to women?

A. Well, I don't believe so, perhaps other than beyond a very brief reference to the type of work that an adjuster does and the places he goes, there was a brief reference to this.

Q. You are sure there was some reference?

A. Yes, I am.

Q. Did he indicate that that had been a long-standing attitude?

A. Yes.

Q. Did he indicate whether it might be changed in the future but that it would take a long time to change?

A. I don't remember that.

Q. How did Mrs. Wetzel and Mrs. Ross respond? I would like you to tell me separately for each of them.

A. My memory is they both said no. Then one of them, I don't remember which one, but I think it was Mrs. Wetzel expanded on their reason for saying no.

Q. And what did she say?

A. Words to the effect that accepting the job of adjuster [66] would not solve the basis for their complaint, words to that effect. I would not resolve the basis for their complaint, something of that nature.

Q. Did they go into any more detail?

A. Not that I recall.

Q. Did they tell you what the basis of their complaint was or what the bases were?

A. They may have referred to the fact that they felt that would not—the other issue involved was the equal pay for the claims representative and the outside adjuster.

Q. You were aware by the time of this meeting, were you not, that Mrs. Wetzel and Mrs. Ross were claiming that Liberty Mutual treated female employees differently than it treated its male employees?

A. I was aware of the complaint of the Commission.

Q. And you were aware that was the basis of the complaint?

A. Yes.

Q. Now, you were present, yesterday, weren't you when Mrs. Ross testified that when Mr. Penney extended the offer, he asked that the fact of the meeting be kept confidential?

A. Yes.

Q. Now, I want to be fair with you. When that testimony [67] was given, I observed Mr. Penney ask you whether you remembered that and I observed your reply that you didn't know. Do you have any recollection of Mr. Penney's making that statement at that meeting?

A. I have none.

Q. Are you able to testify today under oath that he did not make it?

A. I can't believe that he made it but I can't tell you that I can positively say he did.

Q. So you are not in a position to say that he did or did not make it of your own knowledge?

A. I don't think he made it.

Q. Let's have the question again.

(Thereupon the record was read.)

A. How can I answer it other than to say I don't think he made it.

Q. Let me tell you I am not interested at this point whether you believe he did or did not make the statement but whether you can testify under oath whether he did or did not.

A. I can't.

Q. You cannot?

A. That's right.

Q. Have you discussed with Mr. Penney whether he made [68] that statement?

A. Yes.

Q. And what did he say?

Mr. Grove: Don't answer it. Attorney-client relationship.

Q. When did you discuss that with Mr. Penney?

A. Last evening.

Q. Where?

A. I don't remember. Whether at dinner or in the room or walking up to the office or walking to the hotel or where.

Q. Under what circumstances did you discuss it?

A. Well, I guess you would have to say I was telling him that I had no recollection of such a statement and I honestly don't believe that he made it.

Q. Was it during preparation for your testimony today that you discussed it with Mr. Penney?

A. No.

Q. Was it in connection with some particular thing that he was doing or you were doing in connection with this case?

A. Well, the testimony, I guess it was just in reviewing the testimony from yesterday.

Q. Was anyone else present when you discussed it with Mr. Penney?

[69] A. Mr. Grove.

Q. Anyone else?

A. No.

Q. At that meeting, did Mr. Penney discuss with Mrs. Ross and Mrs. Wetzel, why the company would not pay claims representatives on the same scale as claims adjusters?

A. Other than the fact I believe he said they were two different jobs.

Q. Is it your recollection?

A. That is what he said.

Q. Did he explain what was different about the jobs?

A. No, not to my recollection.

Q. Did he offer any explanation concerning what made the jobs different?

A. No.

Q. Did he tell them what their salary would be if they accepted the positions?

A. I don't recall.

Q. Now, you have testified that prior to the time when you met with Mr. Penney and Mrs. Ross and Mrs. Wetzel, Mr. Penney met with them. Now, did Mr. Penney report to you the results of his first meeting?

A. No.

[70] Q. Were you present in Boston on September 26, 1972 when Mr. Penney testified under oath that he reported his findings to both you and Mr. Carr?

A. Yes. I was present when he reported to Mr. Carr but he didn't report to me. He reported to Mr. Carr.

Q. So his testimony that he reported to you was inaccurate?

A. No, not in a sense that I was there and I heard the report. I was present when he reported the conversation to Mr. Carr. I thought you meant did he come to me and report it.

Q. Was anyone else present when Mr. Penney reported to you or Mr. Carr or both?

A. Not to my memory.

Q. If I were to suggest to you that the meeting that you attended with Mrs. Wetzel and Mrs. Ross and Mr. Penney took place in July of 1971, would that refresh your recollection?

A. No. I know it was sometime in July or August or September, it was in that period of time. I don't remember when. I don't remember which month.

(Thereupon a short recess was taken.)

Q. Was the meeting that you had with Mrs. Ross and Mrs. Wetzel, recorded?

A. No.

[71] Q. Do you know what steps, if any, were taken by anyone acting on behalf of Liberty Mutual to determine whether Mrs. Ross and Mrs. Wetzel were qualified to be reclassified, as you put it, prior to the time the job was offered?

A. No.

Q. Have you been told any steps were taken?

A. I was told that they were going to appraise their work. How they went about it, who did it, I don't know.

Q. That was before the time the offer was made?

A. Yes.

Q. How long before?

A. I don't recall.

Q. Who told you their work was going to be appraised?

A. Who told me?

Q. Yes.

A. I would guess Ed Carr.

Q. Was it your recollection that he told you that?

A. Either Ed Carr or Dan Phillips.

Q. Is it your understanding that someone did appraise Mrs. Wetzel's work and Mrs. Ross' work prior to the time it was decided to offer them the position?

A. Yes.

Q. Have you been told the results of that appraisal?

[72] A. No.

Q. Have you been told whether their work was found to be satisfactory.

A. I assumed that it was when the offer was made for them to be reclassified. I assume their work met the standards.

Q. Are you aware Mrs. Ross requested a transfer to the Detroit office?

A. Yes.

Q. When did you learn of that?

A. Just before or just after she terminated. I don't remember which.

Q. Did you at some point, learn that her request was denied?

A. Yes.

Q. When did you learn that?

A. At the time, I guess I was told she requested it. I was away, out of town. My memory is that I got back from a trip somewhere and was told about this.

Q. Since your recollection seems to be so hazy, let me ask you to tell me everything you know about her request and the decision to deny it.

A. All I know is she made the request and the request was denied.

[73] Q. Were you told why it was denied.

A. No.

Q. Who told you she made the request?

A. Either Ed Carr or Dan Phillips.

Q. Who told you it was denied?

A. Either one of them.

Q. Whichever told you she had made it?

A. Yes.

Q. Did anyone tell you why the decision was made to offer the position of claims adjuster to Mrs. Ross and Mrs.Wetzel?

A. My memory of the discussions was that was predicated on feeling that is what they wanted to do.

Q. When Mr. Penney reported to Mr. Carr in your presence, did he report that Mrs. Wetzel and Mrs. Ross said they wanted to be claims adjusters?

Mr. Grove: Don't answer the question. Attorney-client privilege.

Mr. Specter: Let me suggest something to you in the interest of not having to burden the court. To the extent that may be within the privilege and I don't know that it is, Mr. Penney has already testified to it and I believe waived the privilege.

Mr. Grove: Mr. Penney might have [74] waived it on his behalf but I am going to tell Mr. Spaulding not to answer the question.

Q. Were you told that the decision to offer the position of claims adjuster to Mrs. Ross and Mrs. Wetzel had anything to do with the charges they brought before the Pennsylvania Human Relations Commission?

Mr. Grove: Don't answer the question if Mr. Penney was the one that had the discussion with you concerning this.

Did you have a discussion with Mr. Penney concerning this?

The Witness: In Mr. Carr's office.

Mr. Grove: Okay. Don't answer the question.

Q. Were there any other discussions other than with Mr. Penney?

A. I honestly don't know.

Q. Are you familiar with Liberty Mutual Insurance Company's recruiting program?

A. For technical people?

Q. Yes.

A. Not in any great detail.

Q. Tell me what you do know about it.

[75] A. I know they recruit at colleges and I know they employ through employment agencies. Our technical staff comes from those two sources, primarily, in all departments.

Q. Since the spring of 1971, have you had occasion to meet with any representatives of the Pennsylvania Human Relations Commission concerning the charges brought by Mrs. Ross and Mrs. Wetzel?

A. Yes.

Q. On how many occasions?

A. I believe only once.

Q. With whom did you meet?

A. Miss Holiday.

Q. Where did you meet?

A. Pittsburgh.

Q. Where in Pittsburgh?

A. Our office.

Q. Who all was present?

A. Mr. Penney.

Q. Anyone else?

A. No.

Q. Was that meeting recorded?

A. No.

Q. Did you make notes of it?

[76] A. No.

Q. Did Mr. Penney?

A. I don't know.

Q. Did Miss Holliday or Mrs. Holliday—

A. I don't know if it is Miss or Mrs.

Q. Did she make notes?

A. I don't know.

Q. How long did the meeting last?

A. I would—my memory is less than a half-hour.

Q. Did you come to Pittsburgh from Boston for the express purpose of attending that meeting?

A. Yes.

Q. Tell me everything you recall about the meeting.

A. I recall Mr. Penney advised Miss Holliday that he had offered Mrs. Ross and Mrs. Wetzel the opportunity to be reclassified as outside claims adjusters and that they had refused

Q. Anything else?

A. No.

Q. Do you recall anything that Miss Holliday said?

A. No, not in detail, I can't recall—I know she spoke but I don't remember what she said.

Q. You don't remember the substance of anything she said?

[77] A. No.

Q. Did you say anything?

A. Gee, I probably did but I don't remember what.

Q. You remember none of it?

A. No, I don't remember.

Q. Prior to that meeting, the Commission had served one or more interrogatories upon Liberty Mutual, is that right?

A. I think there were interrogatories filed and I assume it was before the meeting. I have no date in mind as to when they were served but I assume it was prior.

Q. Was that interrogatory discussed at the meeting?

A. Gee, it might have been. Now that you mention it, it might have been. I have no memory of it but I think it was.

Q. Now that you have some recollection of its having been discussed, would tell me what you recall about that discussion?

A. We were going to answer it, I guess, I don't remember whether all of it or part of it or what.

Q. Let me ask you not to guess.

A. I don't—

Mr. Grove: Answer it any way you like.

A. I don't remember definitely.

Q. It is your recollection then that the position was [78] taken by Liberty Mutual at that meeting that at least part of the interrogatory would not be answered?

A. That is my memory.

Q. Who said that at the meeting?

A. Mr. Penney.

Mr. Grove: Mr. Specter, if it serves any purpose, I think Mr. Penney mentioned we would be happy to indicate to you we did not answer the interrogatories.

Q. Was there any discussion at that meeting of Liberty Mutual's structure as it relates to the Pittsburgh office, that is whether that is a regional office or an encompassing some broad territory?

A. I don't recall such a conversation.

Q. Was there any discussion about whether the company considered the job of outside adjuster as a job for women?

A. I don't recall that.

Q. Is it possible that that was discussed?

A. It could have been.

Q. You have no recollection?

A. I have no recollection.

Q. Do you have any recollection of Mr. Penney stating at the meeting that the job was more suitable for men?

[79] A. No.

Q. Was there any discussion of whether there was any training for the position of claims adjuster?

A. I don't recall any.

Q. Did Mrs. or Miss Holliday request any other information at that meeting?

A. I don't recall.

Q. Was there any discussion of Liberty Mutual's recruiting practices?

A. I don't recall.

Q. Was there any discussion of newspaper advertisements for prospective Liberty Mutual employees?

A. I don't recall.

Q. Do you know when that meeting took place?

A. Other than in sometime either in August or September, in that general time.

Q. By that time, had—

A. I don't recall the exact dates.

Q. Whenever the date was, had Liberty Mutual begun its program of recruiting claims representatives as claims adjusters?

A. I don't know. It was about that time but I don't know which preceded what.

[80] Q. Was there any discussion at that meeting about whether the job of outside adjuster had been offered to a number of females?

A. I don't recall that. I know Miss or Mrs. Holliday was told Mr. Penney had offered the job to Mrs. Ross and Mrs. Wetzel. I don't recall anything about any other CR's being involved.

Q. Did Mrs. Holiday ask why the job offer had been made to Mrs. Wetzel and Mrs. Ross?

A. I don't recall if she did.

Q. Do you recall whether Mr. Penney told her that the offer was made because of the complaint brought to the Pennsylvania Human Relations Commission?

A. If he didn't say those exact words, I am sure it was in that context.

Q. Is that why the job offer was made?

A. To them, yes.

Q. Were Mrs. Ross and Mrs. Wetzel told that is why the offer was made?

A. I am not sure. In so many words, I am not sure but I am sure it was known it arose out of the complaint.

Q. Did Mr. Penney tell Mrs. Holliday that the job offer had been made because of the complaint to the Commission—[81] strike.

Did he tell Mrs. Holliday that Mrs. Wetzel and Mrs. Ross had been told that they had been offered the job because of the complaint they had lodged?

A. I don't recall that part of it but I think we all realized it arose out of the complaint.

Q. Was there any discussion at that meeting concerning Mrs. Ross' and Mrs. Wetzel's complaints about inquires into anticipated marriage and family size—

A. I don't recall that line of discussion at all.

Q. Are you able to testify today that there was no such discussion at that meeting?

A. Not to my recollection.

Q. Is it your recollection there was no such discussion?

A. I have no recollection there was or wasn't.

Q. Do you have any recollection of any discussion concerning inquiries about birth control pills at that meeting?

A. Same.

Q. Did Mr. Penney tell Mrs. Holliday that he was willing to discuss a settlement with Mrs. Ross and Mrs. Wetzel?

A. I have no recollection of that.

Q. Did he make any statements about the attitude of the [82] company in regard to female employees?

A. In regard to female employees, no, as I recall.

Q. Did Mrs. Holliday ask if there was a union for the employees?

A. I don't remember.

Q. Did Mr. Penney indicate whether he felt the complaint lodged by Mrs. Wetzel and Mrs. Ross was a serious one?

A. I don't recall any discussion about whether it was serious or not serious.

Q. Did he indicate or state to Mrs. Holliday his opinion concerning what Mrs. Ross and Mrs. Wetzel were most interested in?

A. No, not to my recollection.

Q. Was there any discussion concerning the company's employment policies generally at that meeting?

A. Not to my recollection.

Q. Did you report to anyone at Liberty Mutual concerning the meeting?

A. No.

Q. Did you know whether Mr. Penney did?

A. I do not.

Q. You are not issued a hard hat, are you?

A. No, I am not.

[83] Q. How about a brief case?

A. I have a brief case.

Q. Given to you by Liberty Mutual?

A. Well, it was given to me by a friend of mine at Liberty Mutual.

Mr. Specter: That is it.

Further Examination by Mr. Grove

Q. Mr. Spaulding, you testified that you didn't believe that Mr. Penney made the comment to Mrs. Wetzel and Mrs. Ross at the meeting here in Pittsburgh that they should not discuss with anyone the offer that he was making with them. Upon what do you base your belief?

A. Well, my memory is that—

Mr. Specter: Just a second. Do you want him to state everything upon which he bases that belief?

Mrs. Grove: Yes.

A. My memory is that it had been decided that other CR's —qualified CR's would be offered the opportunity to be reclassified and it wouldn't make any sense to tell them not to talk about it because it was going to be common knowledge and

it would be common knowledge after the offer was made to [84] them. So I can't believe it was said.

Mr. Grove: That is all.

Further Examination by Mr. Specter

Q. Is there any other basis for your belief?

A. No, that is it.

Q. Mr. Grove asked you to testify as to every reason you have for not believing Mr. Penney—

A. Those are the reasons.

Q. There are no others?

A. No.

Q. How about anything Mr. Penney told you?

A. Pardon?

Q. How about anything Mr. Penney told you?

A. Mr. Penney told me?

Q. Yes. Did he tell you that he did not make the statement?

Mr. Grove: Don't answer that.

Mr. Specter: Just a second. You have asked for all of the reasons of his belief and if something Mr. Penney said is one of them, a complete answer requires him to state it.

Mr. Grove: Let's go back to the [85] question.

Q. The question is, did Mr. Penney tell you that he did not make the statement?

A. I don't think so.

Mr. Specter: Okay. That is it.

Mr. Grove: We won't waive signature. Send the original to Mr. Spaulding.

.....

KENNETH SPAULDING

Sworn to and subscribed to before me this ..... day of ....., 1972.

.....

Notary Public

[86] CERTIFICATE

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF ALLEGHENY } ss.

I, Dorothy Johnson, a Notary Public in and for the Commonwealth of Pennsylvania, duly commissioned and qualified, do hereby certify that the within-named Kenneth Spaulding was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid; that the testimony then given by him was by me reduced to stenotype in the presence of said witness, afterwards transcribed upon a typewriter, and that the foregoing is a true and correct transcript of the testimony so given by him as aforesaid.

I do further certify that this deposition was taken at the time and place in the foregoing caption specified, and was completed without adjournment.

I do further certify that I am not a relative, counsel or attorney of either party, nor am I otherwise interested in the event of this action.

In witness whereof, I have hereunto set my hand and affixed my seal of office at Pittsburgh, Pennsylvania, on this 1st day of November, 1972.

/s/ DOROTHY JOHNSON
Dorothy Johnson
Notary Public

In and for the Commonwealth of Pennsylvania.

My Commission expires April 9, 1973.

IN THE UNITED STATES DISTRICT COURT

* * (Caption—72-169) * *

DEPOSITION OF KENNETH SPAULDING
MONDAY, NOVEMBER 27, 1972

The deposition of Kenneth Spaulding, witness herein, called by the defendant for examination under the Federal Rules of Civil Procedure, taken before me, the undersigned, Dorothy Johnson, a Notary Public in and for the Commonwealth of Pennsylvania, pursuant to notice, at the offices of Liberty Mutual Insurance Company, Clark Building, Pittsburgh, Pennsylvania, commencing at 11:30 o'clock a.m., the day and date above set forth.

[2] Appearances:

On behalf of the defendant: Kalvin M. Grove, Esquire, Chicago Title & Trust Building, 111 West Washington Street, Chicago, Illinois 60602

PROCEEDINGS

KENNETH SPAULDING witness herein called by the defendant for examination under the Federal Rules of Civil Procedure, having been first duly sworn, as hereinafter certified, was examined and testified as follows:

Mr. Grove: This is a correction of deposition pursuant to Rule 30(e) of the Federal Rules of Civil Procedure.

Mr. Spaulding will start and then Mr. Raymond.

Mr. Spaulding: Page 14, Line 1, the correct answer is yes. A leave of absence has no effect of benefits of seniority.

Mr. Grove: Why are you changing it?

Mr. Spaulding: The answer is wrong as given. It is wrong as given.

[3] Page 15, Line 18, the correct answer is September, 1970. I was wrong in the date of March of 1967.

Page 16, Line 19, the answer is correct on the assumption that the question is based on September, 1970.

Page 17, Line 2, the answer is correct on the assumption that the question is based on September, 1970.

Page 28, Line 11, change three to two. So the answer will read no. We have a two-year income protection plan if you have been with us more than two months and less than five years. The reason for the change is that three is wrong.

Page 31, Line 11, the answer should be changed to read as follows: Overtime hours for inside nonexempt personnel are entered on a form called attendance and turnover record except in those states that require a time slip period

Overtime hours for all outside nonexempt personnel are recorded on time slips. The record of overtime is prepared from the attendance and turnover record or time slips every two weeks for nonexempt [4] inside personnel.

If no overtime has been worked by anyone in the unit, none is recorded by the supervisor on the form.

If overtime has been worked, the supervisor lists the names and the hours worked of each person who has worked overtime.

The outside employee's record of overtime worked its prepared from individual time slips listing the name and hours worked of any outside nonexempt person who worked overtime.

If no one in the unit worked overtime, the outside employee's record of overtime worked is not prepared.

Outside nonexempt employees complete a time slip every pay period (two weeks) whether they work overtime or not.

We have a record-of-overtime form for nonexempt inside employees in each department and/or office for each pay period.

We have a complete time slip for each nonexempt outside employee for each period.

This answers all the questions asked on Pages [5] 31 and 32 on overtime in a corrected fashion.

The reason for the change is that upon reading the answers to those questions, I discovered they were not accurate.

Page 85, Line 4, the answer should be yes, upon reflection, I recall that Mr. Penney did tell me that he did not make the statement.

Mr. Grove: Dorothy, would you send the original to Mr. Spaulding, a copy to myself and a copy to Mr. Specter and we'll waive signature on that and Mr. Spaulding will return to you that and the other one, the original, so that it could be filed.

IN THE UNITED STATES DISTRICT COURT
* * (Caption—72-169) * *

MOTION FOR SUMMARY JUDGMENT

Now Come the plaintiffs, by their attorneys, Litman Litman Harris and Specter, P. A., and Fine, Perlow and Stone, and, on behalf of themselves and the members of the class which they represent, move this Honorable Court for Summary Judgment on the issue of liability alone pursuant to Rule 56 of the Federal Rules of Civil Procedure, as amended, as follows:

1. There is no genuine issue as to any of the following material facts and the plaintiffs and the members of the class which they represent are, therefore, entitled to a judgment as a matter of law:

(a) Since July 1, 1965, defendant has discriminated in hiring and promotion against the plaintiffs and the members of the class represented by plaintiffs by reason of their sex with respect to affording or making available to them the following positions in it Claims Department: Claims Adjuster, Claims Supervisor, Branch Office Manager, Division Claims Manager, Assistant Division Claims Manager, Manager of Home Office Examiners Division, Assistant Vice President and Vice President;

(b) Since July 1, 1965, defendant has discriminated against the plaintiffs and the members of the class represented by plaintiffs by reason of their sex with respect to compensation, terms, conditions and privileges of employment;

Wherefore, plaintiffs move this Honorable Court to render summary judgment in their favor and in favor of the members of the class which they represent on the issue of liability alone on the matters referred to herein and to enjoin the defendant from engaging in such practices in the future.

LITMAN LITMAN HARRIS AND SPECTER, P. A.
By: .....
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned, Howard A. Specter, hereby certifies that on the 23rd day of March, 1973, the within Motion for Summary Judgment was served on defense counsel by mailing, postage prepaid, true and correct copies to the offices of:

Kalvin M. Grove, Esquire
111 West Washington Street
Chicago, Illinois 60602

Robert A. Penney, Esquire
175 Berkeley Street
Boston, Massachusetts 02226

Clem R. Kyle, Esquire
717 Liberty Avenue
Pittsburgh, Pennsylvania 15222

.....
HOWARD A. SPECTER

EXHIBIT E TO PLAINTIFF'S BRIEF FOR SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT

* * (Caption—72-169) * *

AFFIDAVIT OF HOWARD A. SPECTER IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Before Me, the undersigned authority, personally appeared Howard A. Specter, who being duly sworn according to law, deposes and says that he has personal knowledge of the following facts and that such facts are true and correct:

1. That he is one of the attorneys for the plaintiffs in the above-captioned action:

2. That Kenneth W. Raymond, the defendant's Assistant Division Claims Manager for the Central Division, and Kenneth D. Spaulding, the defendant's Manager of Personnel Services, testified at their depositions on April 5, 1972, and October 17, 1972, respectively, that the defendant has a Personnel Policies and Procedures Manual which applies to all employees and departments;

3. That Kalvin M. Grove, one of the attorneys for the defendants in this action, agreed at the time of the depositions to produce a copy of the aforesaid Manual and that it was agreed that Mr. Spaulding would forward a copy of the Manual to this counsel for the plaintiffs;

4. That the defendant delivered to this defendant the Personnel Polices and Procedures Manual a copy of which is annexed to the Plaintiffs' Brief in Support of Motion for Summary Judgment as Exhibit H and represented it to be the Manual referred to at the depositions;

5. That in response to plaintiffs' Requests for Production of Documents, the defendant agreed to produce copies of the

Claims Representative training manuals described in its answer 8.3(a) through (d) to Plaintiffs' Interrogatories to Defendant —Second Set and that the documents annexed to the Plaintiffs' Brief in Support of Motion for Summary Judgment as Exhibit Q are true and correct copies of the cover and first seven pages of the first of those manuals;

6. That in response to plaintiffs' Request for Production of Documents the defendant agreed to produce and did produce copies of the Claims Adjuster recruitment brochures described in its Answers to Interrogatories 37(f) and 38.2(a) through (d) and that the documents annexed to the Plaintiffs' Brief in Support of Motion for Summary Judgment as Exhibits C & D are true and correct copies of two of those brochures;

7. That in response to plaintiffs' Request for Production of Documents the defendants agreed to produce and did produce copies of the employee group benefit plans applicable to technical personnel within its Claims Department and that the documents annexed to the Plaintiffs' Brief in Support of Motion for Summary Judgment as Exhibits I through M are true and correct copies of pages abstracted from the documents produced and dated respectively March 1964, March 1967, April 1968, January 1969 and June 1970;

8. And further deponent saith not.

Sworn to and subscribed before me this 18th day of June, 1973.

/s/ HOWARD A. SPECTER
/s/ DARLYNE RUFFALO
Notary Public

Darlyne Ruffalo, Notary Public, Pittsburgh, Allegheny County, Pa. My commission expires April 18, 1977.

EXHIBIT H TO PLAINTIFF'S BRIEF FOR SUMMARY JUDGMENT

203. *Long Term Absence Policy*

Continued absence caused by illness of eight or more calendar days constitutes a long term illness. All such illnesses should be reported on the Long Term Illness Report, Per. 148, whether the employee qualifies for the Income Protection Plan or not. See paragraph 211 for procedure in connection with the reporting of long term illness and reinstatements from Long Term Illnesses.

Our Income Protection Plan provides for the continuation of Income if during the first seven days of a Long Term Illness the employee is under the care and treatment of a doctor.

If during a long term illness, a doctor has not given treatment until after eight calendar days the benefits of Income Protection are forfeited until the day that the doctor is consulted. This means in effect that the employee will receive Income benefits beginning the day that the doctor is called in on the case. If during the long term illness no doctor is consulted then no Income Protection Benefits are payable.

If the maximum of ten days of short term absence has not already occurred during the calendar year, a maximum of five days for each long term absence in which a doctor has *not* been consulted during the first seven days may be considered as short term and paid for under our short term absence policy or a lesser number of days depending on the number already used. Not more than five days for each absence may be classified as short term and not more than a maximum of ten days for all reasons shall be paid for during the year.

Home Office Salary must be properly advised with a copy to Home Office Benefit Plans if any available days of "short term" absence are to be paid on a Long Term Illnesss as described above. In addition to Per. 148, Report of Long Term Illness,

covering the beginning and ending of lost time, Per. 158, Salary Deduction Authorization, must be forwarded with respect to any and all days for which salary is to be deducted. Coding on attendance records should be "1" (short term illness) for those days payable and "12" (unexcused) for days not payable. Code 9 may be used only for the period covered by our insurance benefits.

Persons who have been with the Company less than 3 months and who therefore have not qualified for our Income Protection Plan will have salary deductions made for all days absent. The Report of Long Term Illness, Per. 148, should be marked "no benefits applicable" for persons whose length of service does not qualify for the Income Protection Plan. Some states have statutory disability insurance and in those states, statutory benefits are paid to employees of less than 3 months service. In such cases, Per. 148 should be marked "Statutory Benefits". Long Term Illness of persons with less than 3 months service should be coded (1) to indicate that all of the absence is being deducted.

An employee who is absent for more than ten consecutive work days during the three-month probationary period will be terminated. Upon return to work, this individual will be re-employed provided he or she is able to pass a new pre-placement examination and will begin a new three-month probationary period.

204. *Pregnancy Policy*

No Income Protection Benefits are payable for absences due to pregnancy.

However, in the case of a long term illness due to pregnancy where the doctor is seen, the Supervisor may in his discretion consider the first five days of such absences as payable under our "short term" absence policy.

EXHIBIT I TO PLAINTIFF'S BRIEF FOR SUMMARY JUDGMENT

INSURANCE BENEFITS begin with the eighth day of disability. If you do not receive treatment before the eighth day of disability, however, benefits do not begin until the first day on which you are treated.

For 51 weeks, the benefits is two-thirds of your salary to a maximum of $150.00 per week and is payable only if you are unable to perform the duties of your occupation.

For 51 weeks, the benefit is two-thirds of your salary to a maximum of $115.00 per week and is payable only if you are unable to perform the duties of any occupation.

These benefits are payable for each period of disability. Successive periods due to the same or related causes will be considered one period of disability.

LIMITATIONS ON INSURANCE BENEFITS:

Benefits are not payable for disability due to occupational injury or to sickness covered under Workmen's Compensation Insurance; for disability due to pregnancy or any cause related to pregnancy; for disability in excess of 104 weeks; or for disability during which you were not treated by a physician licensed to practice medicine.

SUPPLEMENTARY SALARY BENEFITS are provided by the Company to help fill the gap between insurance benefits and your usual earnings. In cases covered by insurance under the Income Protection Plan. Liberty Mutual pays your full salary for the first week of disability. Then, for as many weeks as you have completed years of service with the Company, it pays one-half the difference between full salary and the insurance benefits.

In cases covered under Workmen's Compensation Insurance, the Company will pay, for a period of not more than two years, the difference between the amount you receive and that which you would have received in case of non-occupational injury or

sickness. (In such event, if the disability for which supplementary salary benefits are paid is due to injury or sickness for which a third person is responsible. Liberty Mutual is to be reimbursed out of any damages owed you by the responsible party.)

YOUR COST for the Income Protection Insurance benefits is 33 cents for each $100 of salary. (This is half of the cost; Liberty Mutual pays the other half to you.) For example:

At Weekly Salary of	Bi-Weekly Salary of	Bi-Weekly Cost (Payroll Deduction)
$ 50.	$100.	$ .33
60.	120.	.40
90.	180.	.59
150.	300.	.99
225.	450.	1.49 (max.)

These rates apply in all states except those where compulsory laws necessitate slight variations. The rates are based on present insurance costs and are subject to change if insurance costs change.

YOU BECOME ELIGIBLE after you have completed three months of continuous full-time employment if then actively at work; otherwise, on the date of return to active work. Income Protection Insurance is taken by a full-time employees as a condition of employment.

SPECIAL STATUTORY DISABILITY BENEFITS apply in California, New Jersey, New York and Rhode Island. Employees in these states will be insured for state-required benefits from the first day of employment. You still become eligible for the Income Protection plan after completing three months of continuous full-time employment.

If you are employed in one of these states and disability occurs after you are insured for Income Protection, you will receive under the Income Protection plan the difference between the amount paid by statutory accident and sickness insurance and the benefit you would ordinarily receive from the Income Protection plan.

EXHIBIT J TO PLAINTIFF'S BRIEF FOR SUMMARY JUDGMENT

INSURANCE BENEFITS begin with the eighth day of disability. Employees with more than three months but less than five years of continuous full time service will receive a benefit of two-thirds of salary to a maximum of $150.00 per week, for 103 weeks.

Employees with five years or more of continuous full time service will receive a benefit of two-thirds of salary to a maximum of $275.00 per week to age 65.

These benefits are payable during the first year of disability if you are unable to perform the duties of your occupation. Benefits are payable beyond the first year of disability only if you are unable to perform the duties of any occupation.

Benefits payable for any week of disability will be reduced by amounts payable under workmen's compensation and similar laws, social security laws (primary and dependent benefits) and other statutes, any retirement plan, any group insurance plan except a group policy held by Liberty Mutual, and any remuneration earned during such week.

Benefits are payable for each period of disability, Successive periods due to the same or related causes will be considered one period of disability.

LIMITATIONS ON INSURANCE BENEFITS:

Benefits are not payable for disability due to pregnancy or any cause related to pregnancy, any act of declared or undeclared war, attempted suicide or intentionally self-inflicted injury, or for any disability which does not require throughout its continuance the regular attendance of a physician licensed to prescribe and administer all drugs and to perform all surgical procedures. No benefits will be paid beyond age 65.

SUPPLEMENTARY SALARY BENEFITS are provided by the Company to help fill the gap between insurance benefits and your usual earnings. In cases covered by insurance under the Income Protection Plan. Liberty Mutual pays your full salary for the first week of disability. Then, for as many weeks as you have completed years of service with the Company, it pays one-half the difference between full salary and the insurance benefits.

YOUR COST for the Income Protection Insurance benefits is 33 cents for each $100 of salary. (This is less than one-third of the cost: Liberty Mutual pays the balance for you.) For example:

At Weekly Salary of	Bi-Weekly Salary of	Bi-Weekly Cost (Payroll Deduction)
$ 50.	$100.	$ .33
60.	120.	.40
90.	180.	.59
150.	300.	.99
225.	450.	1.49 (max.)

These rates apply in all states except those where compulsory laws necessitate slight variations. The rates are based on present insurance costs and are subject to change if insurance costs change.

If you are absent from work for any reason, other than vacation or paid excused absence, on the date your insurance would otherwise become effective, the insurance will not be effective until you return to work.

Income Protection Insurance is taken by all full time employees as a condition of employment:

SPECIAL STATUTORY DISABILITY BENEFITS apply in California, New Jersey, New York and Rhode Island. Employees in these states will be insured for state-required benefits from the first day of employment. You still become eligible for the Income Protection plan after completing three months of continuous full-time employment.

If you are employed in one of these states and disability occurs after you are insured for Income Protection, you will receive under the Income Protection plan the difference between the amount paid by statutory accident and sickness insurance and the benefit you would ordinarily receive from the Income Protection plan.

EXHIBIT K ATTACHED TO PLAINTIFF'S BRIEF FOR SUMMARY JUDGMENT

INSURANCE BENEFITS begin with the eighth day of disability. Employees with more than three months but less than five years of continuous full time service will receive a benefit of two-thirds of salary to a maximum of $150.00 per week, for 103 weeks.

Employees with five years or more of continuous full time service will receive a benefit of two-thirds of salary to a maximum of $275.00 per week to age 65.

These benefits are payable during the first year of disability if you are unable to perform the duties of your occupation. Benefits are payable beyond the first year of disability only if you are unable to perform the duties of any occupation.

Benefits payable for any week of disability will be reduced by amounts payable under workmen's compensation and similar laws, social security laws (primary and dependent benefits) and other statutes, any retirement plan, any group insurance plan except a group policy held by Liberty Mutual, and any remuneration earned during such week.

Benefits are payable for each period of disability. Successive periods due to the same or related causes will be considered one period of disability.

Limitations On Insurance Benefits:

Benefits are not payable for disability due to pregnancy or any cause related to pregnancy, any act of declared or undeclared war, attempted suicide or intentionally self-inflicted injury, or for

any disability which does not require throughout its continuance the regular attendance of a physician licensed to prescribe and administer all drugs and to perform all surgical procedures. No benefits will be paid beyond age 65.

SUPPLEMENTARY SALARY BENEFITS are provided by the Company to help fill the gap between insurance benefits and your usual earnings. In cases covered by insurance under the Income Protection Plan, Liberty Mutual pays your full salary for the first week of disability. Then, for as many weeks as you have completed years of service with the Company, it pays one-half the difference between full salary and the insurance benefits.

YOUR COST for the Income Protection Insurance benefits is 33 cents for each $100 of salary. (This is less than one-third of the cost; Liberty Mutual pays the balance for you.) For example:

At Weekly Salary of	Bi-Weekly Salary of	Bi-Weekly Cost (Payroll Deduction)
$ 50.	$100.	$ .33
60.	120.	.40
90.	180.	.59
150.	300.	.99
225.	450.	1.49 (max.)

These rates apply in all states except those where compulsory laws necessitate slight variations. The rates are based on present insurance costs and are subject to change if insurance costs change. If you are absent from work for any reason, other than vacation or paid excused absence, on the date your insurance would otherwise become effective, the insurance will not be effective until you return to work.

Income Protection Insurance is taken by all full time employees as a condition of employment.

SPECIAL STATUTORY DISABILITY BENEFITS apply in California, New Jersey, New York and Rhode Island. Em-

ployees in these states will be insured for state-required benefits the Income Protection plan after completing three months of continuous full-time employment.

If you are employed in one of these states and disability occurs after you are insured for Income Protection, you will receive under the Income Protection plan the difference between the amount paid by statutory accident and sickness insurance and the benefit you would ordinarily receive from the Income Protection plan.

EXHIBIT L TO PLAINTIFF'S BRIEF FOR SUMMARY JUDGMENT

INSURANCE BENEFITS begin with the eighth day of disability. Employees with more than three months but less than five years of continuous full time service will receive a benefit of two-thirds of salary to a maximum of $150.00 per week, for 103 weeks.

Employees with five years or more of continuous full time service will receive a benefit of two-thirds of salary to a maximum of $270.00 per week to age 65.

These benefits are payable during the first year of disability if you are unable to perform the duties of your occupation. Benefits are payable beyond the first year of disability only if you are unable to perform the duties of any occupation.

Benefits payable for any week of disability will be reduced by amounts payable under workmen's compensation and similar laws, social security laws (primary and dependent benefits) and other statutes, any retirement plan, any group insurance plan except a group policy held by Liberty Mutual, and any remuneration earned during such week.

Benefits are payable for each period of disability. Successive periods due to the same or related causes will be considered one period of disability.

Limitations On Insurance Benefits:

Benefits are not payable for disability due to pregnancy or any cause related to pregnancy, any act of declared or undeclared war, attempted suicide or intentionally self-inflicted injury, or for any disability which does not require throughout its continuance the regular attendance of a physician licensed to prescribe and administer all drugs and to perform all surgical procedures. No benefits will be paid beyond age 65.

SUPPLEMENTARY SALARY BENEFITS are provided by the Company to help fill the gap between insurances benefits and your usual earnings. In cases covered by insurance under the Income Protection Plan, Liberty Mutual pays your full salary for the first week of disability. Then, for as many weeks as you have completed years of service with the Company, it pays one-half the difference between full salary and the insurance benefits.

YOUR COST for the Income Protection Insurance benefits is 33 cents for each $100 of salary. (This is less than one-third of the cost; Liberty Mutual pays the balance for you.) For example:

At Weekly Salary of	Bi-Weekly Salary of	Bi-Weekly Cost Payroll Deduction)
$ 50.	$100.	$. 33
60.	120.	.40
90.	180.	.59
150.	300.	.99
225.	450.	1.49 (max.)

These rates apply in all states except those where compulsory laws necessitate slight variations. The rates are based on present insurance costs and are subject to change if insurance costs change. If you are absent from work for any reason, other than vacation or paid excused absence, on the date your insurance would otherwise become effective, the insurance will not be effective until you return to work.

Income Protection Insurance is taken by all full time employees as a condition of employment.

SPECIAL STATUTORY DISABILITY BENEFITS apply in California, New Jersey, New York and Rhode Island. Employees in these states will be insured for state-required benefits from the first day of employment. You still become eligible for the Income Protection plan after completing three months of continuous full-time employment.

If you are employed in one of these states and disability occurs after you are insured for Income Protection, you will receive under the Income Protection plan the difference between the amount paid by statutory accident and sickness insurance and the benefit you would ordinarily receive from the Income Protection plan.

EXHIBIT M TO PLAINTIFF'S BRIEF FOR SUMMARY JUDGMENT

INSURANCE BENEFITS begin with the eighth day of disability. Employees with more than three months but less than five years of continuous full time service will receive a benefit of two-thirds of salary to a maximum of $150.00 per week, for 103 weeks.

Employees with five years or more of continuous full time service will receive a benefit of two-thirds of salary to a maximum of $270.00 per week to age 65.

These benefits are payable during the first year of disability if you are unable to perform the duties of your occupation. Benefits are payable beyond the first year of disability only if you are unable to perform the duties of any occupation.

Benefits payable for any week of disability will be reduced by amounts payable under workmen's compensation and similar laws, social security laws (primary and dependent benefits) and other statutes, any retirement plan, any group insurance

plan except a group policy held by Liberty Mutual, and any remuneration earned during such week.

Benefits are payable for each period of disability. Successive periods due to the same or related causes will be considered one period of disability.

Limitations On Insurance Benefits:

Benefits are not payable for disability due to pregnancy or any cause related to pregnancy, any act of declared or undeclared war, attempted suicide or intentionally self inflicted injury, or for any disability which does not require throughout its continuance the regular attendance of a physician licensed to prescribe and administer all drugs and to perform all surgical procedures. No benefits will be paid beyond age 65.

SUPPLEMENTARY SALARY BENEFITS are provided by the Company to help fill the gap between insurance benefits and your usual earnings. In cases covered by insurance under the Income Protection Plan, Liberty Mutual pays your full salary for the first week of disability. Then, for as many weeks as you have completed years of service with the Company, it pays one-half the difference between full salary and the insurance benefits.

YOUR COST for the Income Protection Insurance benefits is 33 cents for each $100 of salary. (This is less than one-third of the cost; Liberty Mutual pays the balance for you.) For example:

At Weekly Salary of	Bi-Weekly Salary of	Bi-Weekly Cost Payroll Deduction)
$ 50.	$100.	$ .33
60.	120.	.40
90.	180.	.59
150.	300.	.99
225.	450.	1.49 (max.

These rates apply in all states except those where compulsory laws necessitate slight variations. The rates are based on pres-

ent insurance costs and are subject to change if insurance costs change. If you are absent from work for any reason, other than vacation or paid excused absence, on the date your insurance would otherwise become effective, the insurance will not be effective until you return to work.

Income Protection Insurance is taken by all full time employees as a condition of employment.

SPECIAL STATUTORY DISABILITY BENEFITS apply in California, Hawaii, New Jersey, New York and Rhode Island. Employees in most of these states will be insured for state-required benefits from the first day of employment. You still become eligible for the Income Protection plan after completing three months of continuous full-time employment.

If you are employed in one of these states and disability occurs after you are insured for Income Protection, you will receive under the Income Protection plan the difference between the amount paid by statutory accident and sickness insurance and the benefit you would ordinarily receive from the Income Protection plan.

IN THE UNITED STATES DISTRICT COURT

* * (Caption—72-169) * *

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF ALLEGHENY } SS.

Before Me, the undersigned authority, personally appeared Sandra Wetzel, who being duly sworn according to law, deposes and says that she is one of the plaintiffs in the above-captioned action and that she knows that the documents annexed hereto as Exhibits "A" and "B" are copies of the charges filed by her and Mari Ross with the Equal Employment Opportunity Commission against Liberty Mutual Insurance Company.

/s/ SANDRA WETZEL

Sworn to and subscribed before me this 31st day of October, 1973.

/s/ JOYCE E. SMITH
Notary Public

Joyce E. Smith, Notary Public, Pittsburgh, Allegheny Conuty, Pa. My commission expires April 18, 1977.

CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

(PLEASE PRINT OR TYPE)

Case File No. TCLI 2133

1. Your Name (Mr., Mrs., Miss) Mrs. Sandra Wetzel

   indicate Phone Number 412-833-5305

   Street Address Dorchester Dr. Apt. 208

   City Pittsburgh State Pa. Zip Code 15241

2. Was the Discrimination Because of: (Please check one)

   Race or Color ☐ Religious Creed ☐

   National Origin ☐ Sex ☒

3. Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

   Name Liberty Mutual Insurance Co.

   Street address 717 Liberty Ave.

   City Pittsburgh State Pa. Zip Code 15222

   AND (other parties if any) Home Office 378 Stuart St. Boston, Mass. 02117

(Stamp) [Received E. E. O. C. Cl. Reg. Office]

May 17, 1971

9 AM

4. Have you filed this charge with a state or local government agency?

   Yes ☒ When 5 11 71 No ☐

   month day year

5. If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

6. The most recent date on which this discrimination took place:

   Continuous since date of employment

   Month Day Year

7. Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

   I am a claims representative investigating industrial accidents. At Liberty Mutual only women may be claims representatives and only men may be adjusters. Both investigate accidents. The men travel outside the office and the women conduct their investigations by telephone in the office. Both have the same educational backgrounds.

   The men participate in a 6 week training program while the women are trained only when a supervisor has time.

   The work and responsibilities of the men and women are essentially the same but the pay scale differs by several thousand dollars. The men are given company cars and expense accounts to cover travel expenses in addition to the difference in base salary.

   The adjusters have the opportunity of being promoted to supervisor after several years with the company but there is little opportunity for women as the company has traditionally made only men supervisors.

8. I swear or affirm that I have read the above charges and that it is true to the best of my knowledge, information and belief.

   Date 5-14-71 SANDRA WETZEL

   (Sign your name)

Subscribed and sworn to before me this 14 day of May, 1971

BERNADETTE M. WILLIAMS (name) Notary Public (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

(Stamp) Bernadette M. Williams, Notary Public, Pittsburgh, Allegheny County. My commission expires Mar. 11, 1972.

Form App.: Bur. of Budget—No. 124-R0001

Form EEOC-5(Rev.7-68)

CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. TCLI 2132

(Please Print or Type)

1. Your Name (Mr., |Mrs.|, Miss) Mari B. Ross
   Phone Number 412 276-1649
   Street Address 1308 Pennsbury Blvd. S.
   City Pittsburgh State Penna. Zip Code 15205
2. Was the Discrimination Because of: (Please check one)
   Race or Color ☐ Religious Creed ☐
   National Origin ☐ Sex ☒
3. Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.
   Name Liberty Mutual Insurance Company
   Street address 378 Stuart St.
   City Boston State Mass. Zip Code 02177
   And (other parties if any) Local address 717 Liberty Ave. Pitt., Pa. 15222

(Stamp) [Received E. E. O. C. Cl. Reg. Office]
May 17, 1971
9 AM

4. Have you filed this charge with a state or local government agency?

   Yes ☒ When 5 month 11 day 71 year No ☐

5. If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

6. The most recent date on which this discrimination took place:

   Month Day Year

   Continuing since date of employment

7. Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

   1. During interview for position as claims representative was subjected to questions regarding marital situation and birth control.
   2. Once hired was left out of training program, and required to learn job on the desk.
   3. As a claims representative, I do comparable work to an adjuster, for a minimum of $2,600.00 less, than an adjuster receives.
   4. Because Liberty Mutual does not hire women adjusters there is no chance for promotion to supervisor.

8. I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

   Date 5-14-71 MARI B. ROSS
   (Sign your name)

   Subscribed and sworn to before me this 14 day of May 1971
   BERNADETTE M. WILLIAMS (Name) Notary Public (Title)

   If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

Form App.: Bur. of Budget—No. 124-R0001

Form EEOC-5(Rev.7-68)

IN THE UNITED STATES DISTRICT COURT

* * (Caption—72-169) * *

RESPONSE OF DEFENDANT TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The plaintiffs in seeking partial summary judgment in this case[1] claim that no genuine issue of fact exists as to whether the defendant discriminated against females in filling the position of claims adjuster and positions above it; that no genuine issue of fact exists as to whether the defendant discriminated against females in filling the position of claims adjuster and no genuine issue of fact exists as to whether the defendant discriminated against female employees with respect to its employment policies relating to pregnancy and income protection.

In this response defendant will show that there are genuine issues of fact or that there is disagreement concerning the inference to be taken from the facts as to whether it discriminated against females in filling the position of claims adjuster and positions above it and thus the motion for summary judgment must be denied; that there are genuine issues of fact as to whether or not the defendant discriminated against females in filling the position of claims adjuster and thus the motion for summary judgment must be denied, and that this Honorable Court must dismiss that portion of the complaint relating to alleged discrimination in employment policies relating to pregnancy and salary continuation because it is prematurely before

1. Numerous allegations in the complaint are not discussed in plaintiffs' motion presumably because the plaintiffs concede that they involve factual disputes and thus are prevented from consideration in a motion for summary judgment. For example, one such issue is the allegation that the position of claims representative requires for its performance equal skill, effort and responsibility as that required for the position of claims adjuster and is performed under similar working conditions. See *Brennan* v. *Corning Glass Works,* ..... F. 2d ..... (C. A. 3, June 28, 1973).

the court; but *assuming arguendo* that the court entertains this portion of the complaint, a motion for summary judgment is proper because the defendant's employment policies relating to pregnancy and salary continuation are not in factual dispute *but* the issue of liability must be decided in favor of the defendant because its policies are in compliance with Title VII of the Civil Rights Act of 1964, as amended.

Before responding to the issues raised in the plaintiffs' motion, a comment is warranted on thre plaintiffs' tact in this case which is, of course, abundantly evident in this motion. From the day that the complaint was filed and continuing, counsel for the plaintiffs has unceasingly referred to this case as "a class action" or "the class that the plaintiffs represent" or words to this effect. The record is overwhelmingly clear that no motion to allow this case to proceed as a class action has ever been granted nor has any class ever been certified. The only comments from the court concerning the class aspect of the case is the court's observation that if the case were to proceed as a class action the class could not include persons who had terminated their employment with the defendant prior to the filing of the complaint.[2] That observation, while not a ruling, was a clear recognition of the discretion placed in the District Court to determine whether the class action shall be permitted to proceed at all. Furthermore, neither of the named plaintiffs is in the employ of the defendant at this time and the court must, at some point, determine if there are proper representatives of a class and whether or not those representatives will adequately represent the interests of a class.[3] Furthermore, litigation of even any purported general policy of defendant would inevitably focus in detail on the separate work histories of each plaintiff and each member of the class.

To prevail on a motion for summary judgment, the moving party must clearly demonstrate:

2. Order of September 14, 1972.
3. See Affidavit of Edmund A. Carr, marked as Exhibit A.

1. The absence of a genuine issue of material fact;

2. That all doubt as to the existence of material fact must be resolved against the moving party;[4] and

3. That neither factual inferences should be drawn nor credibility issues resolved in favor of the moving party.[5]

All inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing summary judgment[6] and summary judgment shall not be granted unless the entire record shows a right to judgment so as to leave no room for controversy and establish affirmatively that the adverse party cannot prevail under any circumstances.[7] Furthermore, even though there may be no controversy over the basic facts, summary judgment should not be granted if the parties disagree as to the inferences which may properly be drawn.[8]

* * * * *

B. *The Defendant's Employment Policies Relating to Pregnancy and Salary Continuation*

During the past few years the defendant's policies concerning pregnant female employees have undergone several changes. At all times prior to September, 1970, a female employee who became pregnant could work through her sixth month of pregnancy and was then terminated from employment. If the employee desired reemployment and a position was available, the waiting period for the vesting of benefit plans was waived if

4. *First Pennsylvania Banking and Trust Co.* v. *United States Life Insurance Co.*, 421 F. 2d 959 (C. A. 3, 1969); *Associated Hardware Supply Co.* v. *Big Wheel Distributing Co.*, 355 F. 2d 114 (C. A. 3, 1966); *Chamber* v. *U. S.*, 357 F. 2d 224 (C. A. 8, 1966).
5. 6 Moore's Federal Practice ¶ 56.15.
6. *U. S.* v. *Diebold, Incorporated*, 369 U. S. 654 (1962).
7. *Phoenix Savings and Loan, Inc.* v. *Aetna Casualty and Surety Company*, 381 F. 2d 245 (C. A. 4, 1967).
8. *American Fidelity & Casualty Company* v. *London & Edinburgh Insurance Company*, 354 F. 2d 214 (C. A. 7, 1965).

the employee returned within six (6) months from the date of termination.

In September of 1970, the policy relating to pregnancy was changed to allow any female employee who had been employed for one year to request, in writing, a leave of absence; if a doctor verifies that the employee is, in fact, pregnant, a leave of absence is granted for a period of six months from the last day of work or for a period of three months from the date of delivery, whichever comes first.[22] During the leave of absence the employee continues to accumulate the seniority and the employee returns to work in her old position or a comparable one. During the leave of absence the employee does not receive her salary as is true for any other disability not established by medical evidence.[22a]

The Courts have held "that an individual . . . may not bypass the EEOC and seek direct judicial enforcement of his rights but must file a complaint with the EEOC. The courts have reasoned that Congress intended that the EEOC be given an opportunity to investigate and conciliate charges of discrimination as a jurisdictional prerequisite to litigating those charges in federal court." *Tedford* v. *Airco Reduction, Inc.*, ... F. 2d ..... (C. A. 5, 1972); 4 FEP Cases 7654. Certainly, questions will arise over whether or not the issues raised in an enforcement suit in federal court must be strictly confined to the issues raised in the original EEOC complaint. But here those questions cannot arise because the charge originally filed never even mentioned this aspect of the complaint. Courts have recognized that the policies of the Act favoring informal persuasion and voluntary compliance would be undermined if individuals were given complete freedom to litigate in federal courts allegations of

22. During the period of March 1967 through November 1971 the employee could work through the eighth month of pregnancy. From November, 1971 to the present the employee can work through the entire term of her pregnancy until delivery.

22a. Deposition of Kenneth D. Spaulding, pp. 13-17; correction pp. 2-3.

discrimination which were never presented to the EEOC for investigation and conciliation. *Edwards* v. *North American Rockwell Corp.*, 291 F. Supp. 199 (1968); *Kirsey* v. *Legg, Mason and Company, Inc.*, ... F. Supp. ..... (1973); *Carter* v. *Holt-Williamson Manufacturing Company*, ... F. Supp. ..... (1969); *Smith* v. *North American Rockwell Corp.*, ... F. Supp. ..... (1970).

Because of the above authority and the failure of the plaintiffs to follow the proper procedure that portion of the complaint alleging discrimination regarding the defendant's policies on pregnancy and salary continuation must be dismissed.

2. *Assuming arguendo, that the Court does not dismiss the Complaint, Summary Judgment should be granted with a determination that the Defendant's employment policies regarding pregnancy and salary continuation do not discriminate against its female employees on the basis of sex*

A. *Pregnancy*

There can be little doubt that the defendant's present policy of allowing a pregnant female employee the opportunity to work through the entire term of her pregnancy until delivery and then giving her a leave of absence with the right to return to her same or *similar* position is in total compliance with Title VII of the Civil Rights Act of 1967, as amended, and with the Guidelines on Discrimination Because of Sex issued by the United States Equal Opportunity Commission (§ 1604.10). Furthermore, for all practical purposes the current policy has been in effect since September, 1970 which, quite possibly, makes the defendant a leader in the County as concerns the granting of this benefit. This issue (along with that concerning salary continuation presents a case of first impression for the Third Circuit.[24] This case is of such importance that the United

24. A similar case is pending in the United States District Court for the District of Virginia but it is likely that a decision will issue in

States Equal Employment Opportunity Commission has intervened as *Amicus Curiae*. Surely though, the EEOC must come to this Court with "tongue in cheek". The EEOC, which was created by enactment of Title VII of the Civil Rights Act of 1964 did not issue any guidelines on pregnancy until March 1972 and even today the Commission has made no effort to enforce the guidelines nor has it brought action against any employer concerning this matter. The Commission, in its brief, impliedly concedes that the defendant's policy since 1970 is in compliance with the Act but still discriminates because a female employee on maternity leave must return on a date certain. Nevertheless, the Commission admits that only a "few women are likely to be unable to return to work after the birth of the child because of physical disability" and further the Guideline only speaks of termination caused by an employment policy under which "insufficient or no leave is available." The argument of the EEOC is untenable inasmuch as the defendant's rule is lawful and must apply uniformly to all. If exceptions for the unusual case apply here, then the defendant will be susceptible to charges of discrimination if it doesn't grant exceptions to all of its policies; further the EEOC has never said what insufficient leave is.

While the instant motion only involves the matter of liability it seems pertinent to comment concerning the defendant's policy relating to pregnancy from the enactment of Title VII of the Civil Rights Act of 1964 until September, 1970. During that period of time there were no guidelines nor court decisions to guide an employer and the defendant, even before the guidelines, assumed its obligation. To require a remedy for any past violation would be punitive and totally unwarranted.[25]

this matter because briefs will not be due there until sometime in September or later (*Gilbert* v. *General Electric Company*, E. D. Va., 142-72R).

25. Back pay awards are not mandatory under Title VII and the Court is mandated to issue "such affirmative action as may be appropriate". *Kober* v. *Westinghouse Electric Corporation*, 460 F.

B. *Salary Continuation*

Should an employee who voluntarily absents himself or herself from employment receive his or her wages (or a portion thereof) during that absence? The plaintiffs and *amicus* claim that when that absence is caused by reason of pregnancy to a female employee then the wages shall be paid.[26] Pregnancy is a chosen status which normally results from the *voluntary* union of two individuals with consequences that affect the welfare of society. Because it is a planned occurrence, as opposed to an accident, it is wholly without the scope of traditional disability coverage. As opposed to an accident, the pregnant female has voluntarily removed herself from the active work force purely by reason of her own choice; to deny the liability coverage during this period is not to deny it on the bases of sex,[27] but rather on the reason for the absence, i.e., a voluntary reason. To require an employer, in effect, to subsidize the birth of the children of its employees is not only an unreasonable burden but totally out of step with reality.

If the plaintiffs and *amicus* desire that pregnant female employees of the defendant receive their wages while on leave of absence, then the plaintiffs shall convince the *amicus* to sponsor appropriate legislation either to the state or federal government.[28] Most Western nations, other than the United States, provide extensive health and/or disability coverage as part of an overall program of maternity benefits for working

2d 1128 (C. A. 3, 1973); *Fogg* v. *New England Telephone & Telegraph Company*, 5 FEP Cases 7 (1972).

26. Neither the plaintiff nor *amicus* explains the discrimination that will result to employees who do not become pregnant.

27. *Cohen* v. *Chesterfield County School Board*, ... F. 2d ..... (C. A. 4, 1973), *cert. granted*, 41 U. S. L. W. 3565.

28. It is probably wishful thinking to suggest this inasmuch as the plaintiffs' attitude, to date, has been predicated by what they can get out of this case, as opposed to what good they may do.

women.[29] The broad type of "social legislation" fostered by the plaintiffs and *amicus* in this case is before the wrong forum.[30]

The guidelines of the Equal Employment Opportunity Commission are not the law. Admittedly, the Commission because of its "expertise" is entitled to be heard in those areas where it has expertise.[31] But here, it merely issued the Guidelines and has done absolutely nothing to justify them or to show what they say is accurate. In fact, as mentioned above, the Commission has not sought enforcement of the Guidelines in the "salary continuation" area and is relying upon this suit for judicial enforcement.

If the Court determines that the plaintiffs' position is correct, the Court should not require the defendant to pay to its female employees who were granted leave of absence in order to have the children any back pay. Not only will this unjustly enrich the plaintiffs but it would make the defendant the whipping boy for years of vacillation by the EEOC and grant retroactive effect to a guideline where there is no indication whatsoever that the EEOC desired that it be enforced retroactively.

Respectfully submitted,

/s/ KALVIN M. GROVE
Kalvin M. Grove
LEDERER, FOX and GROVE
111 West Washington Street
Chicago, Illinois 60602
ROBERT A. PENNEY
175 Berkeley Street
Boston, Mass. 02226
CLEM R. KYLE
717 Liberty Avenue
Pittsburgh, Pennsylvania 15222
Attorneys for Liberty Mutual Insurance Company, Defendant

Dated: August 31, 1973

29. 7 Harvard Civil Rights Law Review, 760, 788.
30. Dissenting opinion of Judge Williams in *Aiello* v. *Hansen.*
31. *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Response of Defendant to Plaintiffs' Motion for Summary Judgment was mailed on August 31, 1973 to the following:

Howard A. Specter, Esq.
Litman, Litman, Harris and Specter, P. A.
Grant Building
Pittsburgh, Pa. 15219

Robert F. Stone, Esq.
Fine, Perlow & Stone
3025 Mellon Bank Building
Pittsburgh, Pa. 15219

James F. Bennett, Esq.
Equal Employment Opportunity Commission
Federal Building
1000 Liberty Avenue
Pittsburgh, Pa. 15222

/s/ KALVIN M. GROVE
Kalvin M. Grove

RETURN ADDRESS

U.S. EQUAL [illegible]
[illegible]
1000 LIBERTY AVE. SUITE [illegible]
PITTSBURGH, PA 15222

IMPORTANT
See Notice of Non-retaliation on reverse.

MAIL THIS ADDRESS

Chief Executive Officer
Liberty Mutual Ins. Company
717 Liberty Avenue
Pittsburgh, PA

[illegible]

TPI2-0303

DATE OF VIOLATION

Continuing

PLACE OF VIOLATION

Mailing Address

NOTICE OF CHARGE OF EMPLOYMENT DISCRIMINATION

You are hereby notified that a charge of employment discrimination under Sec. 706 of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000-3, as amended, has been filed against you. Information relating to the date, place, and circumstances of the alleged unlawful employment practice or practices is provided herein. The Act does not contemplate that the name of the person bringing the charge be made available to you.

No action on your part is necessary at this time. However, if you wish to submit any information in writing, it will be made a part of the file and will be considered at the time we investigate this charge. Telephone communications cannot be made a part of the record. Section 1602.14 of the Commission's Regulations requires the preservation of all relevant personnel records until this charge is resolved.

We will investigate this charge as soon as possible. However, our heavy backing of pending work makes it impossible to predict when we will contact you again. We hope that you will hold any questions about the possible complaint in abeyance until we are able to begin the investigation.

PARTIES OF DISCRIMINATION [illegible]

☐ [illegible] ☒ [illegible] ☐ [illegible] ☐ [illegible]

[illegible]

[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	☒ [illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	

DATE

E.E.O.C. District Director

EEOC FORM 131 MAR 72

RESPONDENT'S COPY

EXHIBIT H. - -

BEST COPY AVAILABLE

NOTICE OF NON-RETALIATION REQUIREMENT

Section 704(a) of the Civil Rights Act of 1964, as amended, states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a [illegible] to discriminate against any member thereof or applicant for [illegible] by this title, or for any [illegible] in any manner in an [illegible] under this title.

Persons filing charges of employment discrimination are advised of this Non-Retaliation Requirement and instructed to notify the Equal Employment Opportunity Commission if any attempt at retaliation is made.

William H. Brown III, Chairman

BEST COPY AVAILABLE

[illegible]

[illegible]

[illegible]

[illegible]

IMPORTANT
See Notice of Non-retaliation on reverse.

MAILING ADDRESS

Chief Executive Officer
Liberty Mutual Insurance Co.
717 Liberty Avenue
Pittsburgh, PA

FUTURE CORRESPONDENCE WILL REFER TO CHARGE NO.

[illegible]

DATE OF VIOLATION

Continuing

PLACE OF VIOLATION

Mailing Address

NOTICE OF CHARGE OF EMPLOYMENT DISCRIMINATION

You are hereby notified that a charge of employment discrimination under Sec. 706 of the Civil Rights Act of 1964, 42 U.S.C. Sec. [illegible], as amended, has been filed against you. Information relating to the date, place, and circumstances of the alleged unlawful employment practice or practices is provided herein. The Act does not contemplate that the name of the person bringing the charge be made available to you.

No action on your part is necessary at this time. However, if you wish to submit any information in [illegible], it will be made a part of the file and will be considered at the time we investigate this charge. Telephone communication is cannot be made a part of the record. Section [illegible] of the Commission's regulations requires the preservation of all relevant personnel records until this charge is resolved.

We will investigate this charge as soon as possible. However, our heavy backlog of pending work makes it impossible to predict when we will contact you again. We hope that you will hold any questions about the [illegible] complaint in abeyance until we are able to begin the investigation.

[illegible]

☐ Race or color ☒ Sex ☐ Religion ☐ National Origin

NATURE OF CHARGE

[illegible]	☐	Job classification	☐ Benefits
[illegible]	☐	Training/apprenticeship	☐ Segregated facilities
[illegible]	☐	Exclusion	☐ Intimidation/reprisal
[illegible]	☐	Union representation	☐ Denial of [illegible]
[illegible]	☐	Seniority/leave	☒ Terms and conditions
[illegible]	☐	Interest	☐ Unspecified and other
[illegible]	☐	Qualification/testing	☐ OTHER (Specify)
[illegible]	☐	Advertising	☐

EEOC District Director

FORM [illegible] 131

RESPONDENT'S COPY

EXHIBIT I

BEST COPY AVAILABLE

NOTICE OF NON-RETALIATION REQUIREMENT

[illegible] of the Civil Rights Act of 1964, as amended, states:

[illegible]

Persons filing charges of employment discrimination are advised of this Non-Retaliation Requirement and instructed to notify the Equal Employment Opportunity Commission if any attempt at retaliation is made.

William H. Brown III, Chairman

BEST COPY AVAILABLE

BEST COPY AVAILABLE

Your Placement Director will be glad to arrange a personal interview, or write to:

Administrative Manager
Liberty Mutual Insurance Company
at one of the following offices:

1718 Peachtree Road, N.W.
Atlanta, Georgia 30302

175 Berkeley Street
Boston, Massachusetts 02117

1 South Wacker Drive
Chicago, Illinois 60606

3010 Maple Avenue
Dallas, Texas 75219

10 Rockefeller Plaza
New York, New York 10020

15 Esso Road, Bala-Cynwyd
Philadelphia, Pennsylvania 19004

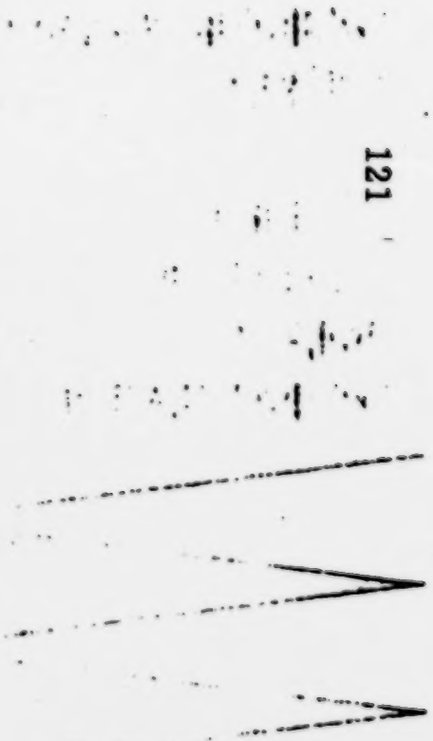
717 Liberty Avenue
Pittsburgh, Pennsylvania 15222

216 Pine Street
San Francisco, California 94104

783 Don Mills Road
Don Mills, Ontario, Canada

the company that stands by you

BRANCH OFFICE CLAIMS MANAGER



121

EXHIBIT A

All Claims Department promotions are from within our own department. Liberty Mutual's dynamic growth has averaged 10 to 11 percent year after year. Our growth rate requires us to maintain or increase the rate of promotions. The Company's growth also sets a most favorable climate for the individual's growth. On the average, three to five years experience in the entry position is needed for success and the first promotion is usually from Adjuster to Supervisor, the Claims Department's first level of management. Successful Supervisors are selected for promotion to all other management levels.

Advancement for those who start as Claims Adjusters is not confined to the Claims Department. Because Claims is the Company's largest single department and has the largest number of college graduates, we are frequently called upon to furnish able people to handle responsible positions in other departments of the Company.

We are glad to interview and hire regardless of service. Most of the men hired prior to military service have returned to continue their careers with us. Many of the men entering on active duty immediately after graduation join us afterward as a direct result of our original campus visit.

We recommend, in fact we strongly urge, that seniors facing early military service schedule campus interviews in order to learn all they can about career opportunities in which they may be interested.

Are you the right man?

If this presentation touches upon your interests and concepts of job satisfaction, and if you believe the challenges of Claims work are in tune with your temperament and capabilities, we would like to talk to you.

The occupations discussed in this brochure are considered more attractive to men. The brochure is not, however, intended to exclude or discourage female applicants.

BEST COPY AVAILABLE

HOME OFFICE EXAMINERS
DIVISION

DIVISION
CLAIMS MANAGER

These are the chief managerial positions in Liberty Mutual's Claims Department. All men occupying these positions were once Claims Adjusters with Liberty Mutual.

They attained their positions of responsibility by training, ability, desire and performance.

You can attain one or all of these positions in exactly the same way.

Our formal Training Program is designed to equip you with the principles and techniques for the right start. If you have motivation, learning ability, interest and competitive drive, you'll enjoy your entry job and try to advance beyond it.

Are you the right man?

That depends on a number of things, the most important of which is a self-analysis of your interests, ambitions, capabilities, concepts of job-satisfaction and temperament.

Let's take a close look at your entry job. What is the Claims Adjuster's objective? What are his duties? How does he perform them? How is he trained?

BEST COPY AVAILABLE

OBJECTIVE:
His objective is to furnish our policyholders with the protection promised in the policies they purchased. When our policyholders have accidents, they expect this protection to take the form of prompt payment of valid claims and prompt denial of invalid claims.

DUTIES:
The Claims Adjuster is, first of all, Liberty's fact-finder. His first duty when he is assigned an accident investigation is to determine the cause of the accident as well as the scope and extent of the accident. If payment is warranted, he negotiates prompt settlement with the injured person, or his attorney. It takes men of sound judgment to spend the Company's money wisely. This is the Claims Adjuster's most important responsibility.

PERFORMANCE:
OBTAINING THE FACTS
The Adjuster is a salaried representative working almost entirely outside the office. Many of his calls are at the homes of people he has never seen before and may never see again. He must seek facts wherever and whenever they are best available, and that usually means at the convenience of the stranger possessing the facts.

Street intersections, construction job sites, waterfront operations, fires, burglary and hold-up scenes, explosions—these demand his attention throughout each day and constitute his "office" of the moment.

Many professional people must also be interviewed. To determine the cause of an accident, technical explanations are often needed. The opinions of other professional people—from physician to mechanic—will be sought to determine as precisely as possible the after-effects of the accident.

To obtain necessary facts from lay witnesses and the opinions and advice of professional people, the Adjuster must have the ability to "speak the language" of all.

EVALUATING THE FACTS
Sound, practical judgment must be used by the Adjuster in evaluating the facts and professional opinions he has obtained. He must decide whether or not he will voluntarily pay any money on each particular case and, if so, how much of the Company's money he is justified in paying. Each case is different and the facts of each determine how much, if anything, should be paid.

SKILLFUL NEGOTIATION
Successful denials of payments and skillful negotiations of payments at figures consistent with the facts do not just happen. They are intelligently planned and convincingly executed with good judgment. Furthermore, the Adjuster must explain to the injured person why the amount we are willing to pay is proper in view of the facts and circumstances. An amicable settlement calls for the utmost in sincerity, tact, diplomacy and persuasion.

TRAINING:
Insurance is a complex subject; however, no man presently holding a managerial position in Liberty's Claims Department had any claims training before he joined us.

Each Liberty Adjuster starts his career with an Orientation and Principles course at one of the Claims Department's eight Training Centers, located in major metropolitan areas of the country. There he spends eight weeks in both classroom and on-the-street training in techniques before he reports to his office of assignment. Training for the Liberty Adjuster continues throughout his career.

Advanced Training Seminars provide broader technical knowledge. The individualized guidance of the Supervisor and all these training media combine to groom the Liberty Adjuster for future management positions.

SALARY:
Your Placement Director can tell you our current starting salary. All increases are based on demonstrated merit and progress in learning to be a successful Adjuster—while you are filling the entry position and subsequent positions to which you are promoted. The first opportunity for a merit increase will be at the successful completion of the 3 months training period. A second opportunity will occur after 12 months employment, and thereafter salary reviews, upon which merit increases are based, will take place annually. Salary increases accompany all promotions.

BEST COPY AVAILABLE

DIVISION

BRANCH OFFICE
CLAIMS MANAGER

BEST COPY AVAILABLE

Your Placement Counsellor will be glad to arrange a personal interview, or write to:

Administrative Manager
Liberty Mutual Insurance Company
at one of the following offices:

1718 Peachtree Road, N.W.
Atlanta, Georgia 30309

175 Berkeley Street
Boston, Massachusetts 02117

1 South Wacker Drive
Chicago, Illinois 60606

3200 Maple Avenue
Dallas, Texas 75219

10 Rockefeller Plaza
New York, New York 10020

15 East Road, Bala-Cynwyd
Philadelphia, Pennsylvania 19004

717 Liberty Avenue
Pittsburgh, Pennsylvania 15222

216 Pine Street
San Francisco, California 94104

1200 Eglington Ave. E
Don Mills 402, Ontario, Canada

the company that stands by you

125

EXHIBIT B

VICE
PRESIDENT

All Claims Department promotions are from within our own department. Liberty Mutual's dynamic growth has averaged 10 to 11 percent year after year. Our growth rate requires us to maintain or increase the rate of promotions. The Company's growth also sets a most favorable climate for the individual's growth. On the average, three to five years experience in the entry position is needed for success and the first promotion is usually from Adjuster to Supervisor, the Claims Department's first level of management. Successful supervisors are selected for promotion to all other management levels.

Advancement for those who start as Claims Adjusters is not confined to the Claims Department. Because Claims is the Company's largest single department and has the largest number of college graduates, we are frequently called upon to furnish able people to have responsible positions in other departments of the Company.

We are glad to interview and hire regardless of service. Most of the men hired prior to military service have returned to continue their careers with us. Many of the men entering on active duty immediately after graduation join us afterward as a direct result of our original campus visit.

We recommend, in fact we strongly urge, that seniors facing early military service schedule campus interviews in order to learn all they can about career opportunities in which they may be interested.

Are you the right person?

If this presentation touches upon your interests and concepts of job satisfaction, and if you believe the challenges of Claims work are in tune with your temperament and capabilities, we would like to talk to you.

BEST COPY AVAILABLE

DIVISION CLAIMS MANAGER

These are the chief managerial positions in Liberty Mutual's Claims Department. All men occupying these positions were once Claims Adjusters with Liberty Mutual.

They attained their positions of responsibility by training, ability, desire and performance.

You can attain one or all of these positions in exactly the same way.

Our formal Training Program is designed to equip you with the principles and techniques for the right start. If you have motivation, learning ability, interest and competitive drive, you'll enjoy your entry job and try to advance beyond it.

Are you the right man?

That depends on a number of things, the most important of which is a self-analysis of your interests, ambitions, capabilities, concepts of job-satisfaction and temperament.

Let's take a close look at your entry job. What is the Claims Adjuster's objective? What are his duties? How does he perform them? How is he trained?

OBJECTIVE:
His objective is to furnish our policyholders with the protection promised in the policies they purchased. When our policyholders have accidents, they expect this protection to take the form of prompt payment of valid claims and prompt denial of invalid claims.

The Claims Adjuster is, first of all, Liberty's fact-finder. His first duty when he is assigned an accident investigation is to determine the cause of the accident as well as the scope and extent of the accident. If payment is warranted, he negotiates prompt settlement with the injured person, or his attorney. It takes men of sound judgment to spend the Company's money wisely. This is the Claims Adjuster's most important responsibility.

OBTAINING THE FACTS
The Adjuster is a salaried representative working almost entirely outside the office. Many of his calls are at the homes of people he has never seen before and may never see again. He must seek facts wherever and whenever they are best available, and that usually means at the convenience of the stranger possessing the facts.

Street intersections, construction job sites, waterfront operations, fires, burglary and hold-up scenes, explosions—these demand his attention throughout each day and constitute his "office" of the moment.

BEST COPY AVAILABLE

BEST COPY AVAILABLE

OBJECTIVE:
His objective is to furnish our policyholders with the protection promised in the policies they purchased. When our policyholders have accidents, they expect this protection to take the form of prompt payment of valid claims and prompt denial of invalid claims.

DUTIES
The Claims Adjuster is, first of all, Liberty's fact-finder. His first duty when he is assigned an accident investigation is to determine the cause of the accident as well as the scope and extent of the accident. If payment is warranted, he negotiates prompt settlement with the injured person, or his attorney. It takes men of sound judgment to spend the Company's money wisely. This is the Claims Adjuster's most important responsibility.

OBTAINING THE FACTS
The Adjuster is a salaried representative working almost entirely outside the office. Many of his calls are at the homes of people he has never seen before and may never see again. He must seek facts wherever and whenever they are best available, and that usually means at the convenience of the stranger possessing the facts.

Street intersections, construction job sites, waterfront operations, fires, burglary and hold-up scenes, explosions—these demand his attention throughout each day and constitute his "office" of the moment.

Many professional people must also be interviewed. To determine the cause of an accident, technical opinions are often needed. The opinions of other professional people—from physician to mechanic—will be sought to determine as precisely as possible the after-effects of the accident.

To obtain necessary facts from lay witnesses and the opinions and advice of professional people, the Adjuster must have the ability to "speak the language" of all.

EVALUATING THE FACTS
Sound, practical judgment must be used by the Adjuster in evaluating the facts and professional opinions he has obtained. He must decide whether or not he will voluntarily pay any money on each particular case and, if so, how much of the Company's money he is justified in paying. Each case is different and the facts of each determine how much, if anything, should be paid.

SKILLFUL NEGOTIATION
Successful denials of payments and skillful negotiations of payments at figures consistent with the facts do not just happen. They are intelligently planned and convincingly executed with good judgment. Furthermore, the Adjuster must explain to the injured person why the amount we are willing to pay is proper in view of the facts and circumstances. An amicable settlement calls for the utmost in sincerity, tact, diplomacy and persuasion.

TRAINING
Insurance is a complex subject; however, no man presently holding a managerial position in Liberty's Claims Department had any claims training before he joined us.

Each Liberty Adjuster starts his career with an Orientation and Principles course at one of the Claims Department's eight Training Centers, located in major metropolitan areas of the country. There he spends eight weeks in both classroom and on-the-street training in techniques before he reports to his office of assignment. Training for the Liberty Adjuster continues throughout his career.

Advanced Training Seminars provide broader technical knowledge. The individualized guidance of the Supervisor and all these training media combine to groom the Liberty Adjuster for future management positions.

SALARY
Your Placement Director can tell you our current starting salary. All increases are based on demonstrated merit and progress in learning to be a successful Adjuster—while you are filling the entry position and subsequent positions to which you are promoted. The first opportunity for a merit increase will be at the successful completion of the 3 months training period. A second opportunity will occur after 12 months employment, and thereafter salary reviews, upon which merit increases are based, will take place annually. Salary increases accompany all promotions.

RETURN ADDRESS

U.S. [illegible]
[illegible]
[illegible]
[illegible]

IMPORTANT
See Notice of Non-retaliation on reverse.

MAILING ADDRESS

Chief Executive Officer
Liberty Mutual Ins. Company
717 Liberty Avenue
Pittsburgh, PA

[illegible]

TPI2-0303

DATE OF VIOLATION

Continuing

PLACE OF VIOLATION

Mailing Address

NOTICE OF CHARGE OF EMPLOYMENT DISCRIMINATION

You are hereby notified that a charge of employment discrimination under Sec. 706 of the Civil Rights Act of 1964, 42 U.S.C. Sec. [illegible], as amended, has been filed against you. Information relating to the date, place, and circumstances of the alleged unlawful employment practice or practices is provided herein. The Act does not contemplate that the name of the person bringing the charge be made available to you.

No action on your part is necessary at this time. However, if you wish to submit any information in writing, it will be made a part of the file and will be considered at the time we investigate this charge. Telephone communications cannot be made a part of the record. Section 1602.14 of the Commission's Regulations requires the conservation of all relevant personnel records until this charge is resolved.

We will investigate this charge as soon as possible. However, our heavy backlog of pending work makes it impossible to predict when we will contact you again. We hope that you will hold any questions about the [illegible] in abeyance until we are able to begin the investigation.

[illegible]	[illegible]	[X] [illegible]	[illegible]	[illegible]

[illegible]

[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]

DATE

E.E.O.C. District Director

EEOC FORM 131 MAR 72

RESPONDENT'S COPY

EXHIBIT H- - -

BEST COPY AVAILABLE

NOTICE OF NON-RETALIATION REQUIREMENT

Section 70[illegible] of the Civil Rights Act of 1964, as amended, states:

[illegible]

Persons filing charges of employment discrimination are advised of this Non-Retaliation Requirement and instructed to notify the Equal Employment Opportunity Commission [illegible]

William H. Brown III, Chairman

BEST COPY AVAILABLE

[illegible]	**IMPORTANT** See Notice of Non-retaliation on reverse.
MAILING ADDRESS Chief Executive Officer Liberty Mutual Insurance Co. 717 Liberty Avenue Pittsburgh, PA	FUTURE CORRESPONDENCE WILL REFER TO CHARGE NO. [illegible] DATE OF VIOLATION Continuing PLACE OF VIOLATION Mailing Address

NOTICE OF CHARGE OF EMPLOYMENT DISCRIMINATION

You are hereby notified that a charge of employment discrimination under Sec. 706 of the Civil Rights Act of 1964, 42 U.S.C. Sec. [illegible], as amended, has been filed against you. Information relating to the date, place, and circumstances of the alleged unlawful employment practice or practices is provided herein. The Act does not contemplate that the name of the person bringing the charge be made available to you.

No action on your part is necessary at this time. However, if you wish to submit any information in writing, it will be made a part of the file and will be considered at the time we investigate this charge. Telephone communication is cannot be made a part of the record. Section [illegible] of the Commission's Regulations requires the preservation of all relevant personnel records until this charge is resolved.

We will investigate this charge as soon as possible. However, our heavy backlog of pending [illegible] is [illegible] when we will contact you again. We hope that you will hold any questions about [illegible] complaint in abeyance until we are able to begin the investigation.

[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]

DATE

EEOC District Director

EEOC FORM 131 RESPONDENT'S COPY

EXHIBIT I

BEST COPY AVAILABLE

IN THE UNITED STATES DISTRICT COURT

* * (Caption—72-169) * *

OPINION

WEBER, *J.* January 9, 1974

The two named Plaintiffs on behalf of themselves and all other female technical employees employed in Defendant Liberty Mutual Insurance Company's Claims Department (the Company) have filed a Complaint charging that the Company discriminated against women in hiring, job classification, promotions, and in the compensation and job benefits they received for the jobs they were allowed to hold.

The Representative Plaintiffs are Sandra Wetzel, a woman, who was hired by Defendant Company as a "Claims Representative" in July 1967, and Mari Ross, who was hired by Defendant Company as a "Claims Representative" in September 1967. Both allege that they suffered discrimination by reason of their sex because of the hiring, job classification, pay differential, and employment benefit policies of Defendant Company, and that these policies were applied to all female technical employees in the Defendant's Claims Department throughout the nation where Defendant Company did business.

The court determined that the action should proceed as a class action covering all female technical employees in the Defendant's Claims Department in the entire geographical area where the Company did business. The class as now defined includes all such employees who were hired or working for the Company in its Claims Department since July 2, 1965, the effective date of Title VII of 42 U. S. C. 2000e et seq., the Equal Employment Opportunity Act of 1972.

Extensive discovery has been employed and the Plaintiffs now file a motion for partial summary judgment on certain of the issues raised. It is agreed between the parties that one of the

issues, designated the "equal pay" issue, is not susceptible of summary judgment at this time because there are disputed issues of fact with respect to whether or not the work performed by women in the job classification of "Claims Representative" was equal to the work performed by men in the job classification of "Claims Adjuster" for which they were paid a substantially higher salary. However, the Plaintiffs at this time allege that there is no genuine issue as to any material fact with respect to the job classification under which men and women were originally hired as technical employees in the Claims Department, with regard to the promotional policy within the Claims Department, and with regard to the pregnancy and maternity leave policies of the Company including the disability income protection plan of the Company as applied to women on maternity leave.

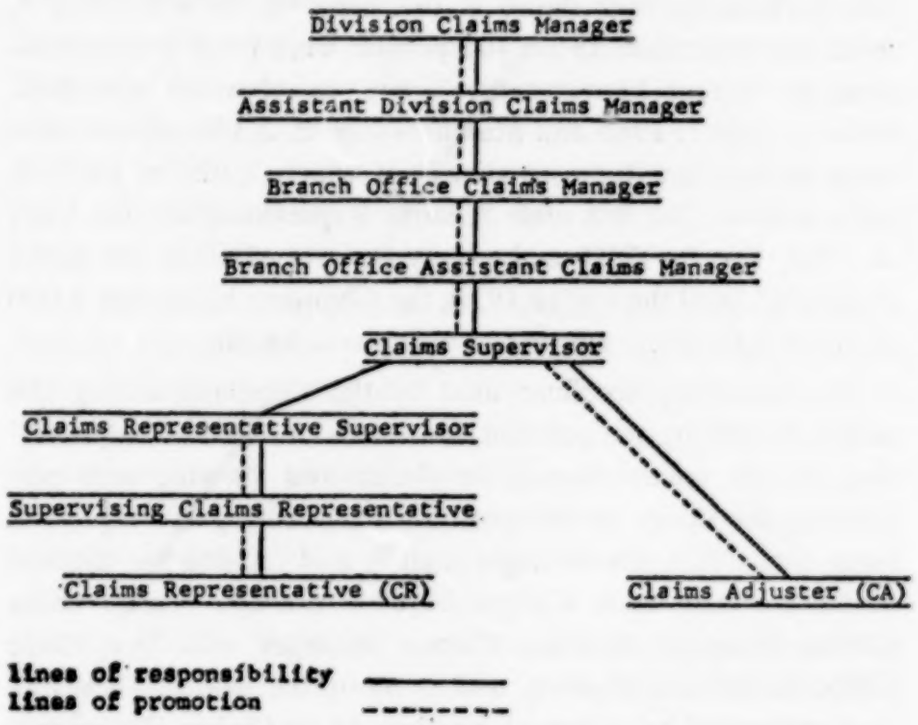
The key point of discrimination set forth in the pleadings, evidentiary material and briefs of the plaintiffs, and the *amicus curiae* brief of the United States Equal Employment Opportunity Commission is the hiring policy of the Company, since original assignment in effect determines the employee's future chances of promotion within the Company. Because the Company in its Claims Department promotes from its own ranks, the opportunity for advancement depends upon the entry level position to which an employee is assigned upon first being employed by the Company's claim division. Promotion to the higher rank of Claims Supervisor was limited to persons holding the position of Claims Adjuster and throughout most of the period under consideration through 1970 was limited to male employees because all Claims Adjusters were male. On the other hand the entry level classification in the Company's Claims Department of "Claims Representative" was exclusively limited to women throughout most of the period under consideration here. There was no avenue of promotion from those personnel classified as "Claims Representatives" on entry into the Company in its Claims Division.

There were two higher supervisory positions in the "Claims Representative" category, that of "Supervising Claims Representative" and "Claims Representative Supervisor," but no promotion beyond the second rank. Although the line of responsibility from "Claims Representative Supervisor" runs to "Claims Supervisor" there is no similar line of promotion because all "Claims Supervisors" are drawn from the ranks of "Claims Adjuster."

The lines of responsibility and promotion are illustrated as follows:

CLAIMS DEPARTMENT - TECHNICAL EMPLOYEES

LINES OF RESPONSIBILITY AND PROMOTION



The same educational requirements were in 1965 and thereafter until 1970 with respect to the hiring of "Claims Adjusters" and "Claims Representatives", a college degree. No prior experience in the insurance business was required and in fact the Company did not hire persons who had worked for other insur-

ance companies in its entry level positions in the Claims Department.

Although the Defendant Company had employed "Claims Adjusters" for a long period of time the position of "Claims Representative" was created in mid-1965. The position was created when the Company had decided to handle more of its claims work from inside its offices. A recruiting brochure for this position was prepared and circulated through college placement offices and employment agencies. The qualification for the "Claims Representative" position included a college degree. The recruiting brochure is entirely female oriented. Its title page bears the caption and picture identifying the position as a job fit for a queen. It shows women in its illustrations of persons performing their duties in this capacity. Between July 1, 1965 and the end of 1966, 401 persons were hired for the positions of "Claims Representative", not one of which was male. Between July 1, 1965 and March 17, 1972, 2,329 persons were hired as "Claims Representatives" of which 2,302 or 98.84% were women. The first male "Claims Representative" was hired in 1969, four in 1970, and twenty in 1971. During the period from 1965 until the end of 1970, the Company hired over 2,000 "Claims Adjusters", not one of which was female.

The recruiting brochure used by the Company during this period describing the position and duties of "Claims Adjusters" was entirely male oriented, its illustrations showing men performing the duties of the position, and bearing the legend in large type, "Are you the right man?", and reciting the avenues of advancement from Claims Adjuster through Branch Office Claims Manager, Division Claims Manager, Manager Home Office Examiners' Division, and so on up the ladder. The Company promoted to advanced positions in its Claims Department solely from those persons who had served it in the capacity of "Claims Adjuster".

The two Representative Plaintiffs were hired in the position of "Claims Representative" and they have deposed that in answer to their inquiries they were informed that the position of "Claims Adjuster", the beginning of the promotional ladder in the Claims Department, was not available for women. It has been admitted by representatives of the Defendant that the two named Representative Plaintiffs were qualified for the position of "Claims Adjuster" at the time of the original hiring.

It would serve little purpose to recite in detail the great mass of statistical evidence which the Plaintiffs have produced in support of their contention that the two initial entry positions were segregated between male and female applicants, that the educational requirement for both positions was the same, that no prior insurance experience was required for either position, that the functions performed in these positions were very similar, that the pay differential between the positions was substantial, being approximately $2,500 per year greater for the Claims Adjuster, that prior to 1971 no opportunity was given to women "Claims Representatives" to qualify for the position of "Claims Adjuster", and that all promotions to higher positions in the Claims Department were made from the ranks of the exclusively male "Claims Adjuster" classification.

In addition to the statistical evidence which is unrebutted here the Plaintiffs have produced additional supporting evidence of the Company's employment policies with respect to women in the Claims Division. Much of this evidence is in the form of oral testimony and affidavits which may be subject to a question of credibility but a good deal of the supporting evidence is documentary and supports the Plaintiffs' contention of a recognized pattern of treating the male and female employees in the Claims Department differently in respect to recruitment, hiring classifications, promotional opportunities, and salary.

We are not speaking of salary or compensation with respect to the question of whether equal pay was given for the same work but in connection with the entry level salary paid for the two classifications and the salary differential between "Claims

Representatives" of considerable experience and the starting salary which they could receive when openings were finally made available to "Claims Representatives" to become "Claims Adjusters."

Two sections of Fed. R. Civ. P. 56 are applicable to our consideration of Plaintiffs' motion for summary judgment. Fed. R. Civ. P. 56(c) provides in part:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and the admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law."

and Fed. R. Civ. P. 56(e) which provides in part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits, or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The Plaintiffs have relied chiefly on statistical evidence in support of their contention of discriminatory employment policies and in many cases the courts have accepted such evidence in determination of whether Title VII has been violated. *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 [8th Cir. 1970]; *Witherspoon* v. *Mercury Freight Lines, Inc.*, 457 F. 2d 496 [5th Cir. 1972]; *Bing* v. *Roadway Express, Inc.*, 444 F. 2d 678 [5th Cir. 1971]; *Roe* v. *General Motors Corp.*, 457 F. 2d 348 [5th Cir. 1972]. In accordance with the decisions and under the doctrine of *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 [1973], once the plaintiff has established a prima facie case by setting forth statistics of this kind the burden is on the employer to sufficiently explain the disparity in hiring; conclusory statements that the employer never discriminated in

hiring is insufficient to satisfy this burden. As stated in *McDonnel*, supra, "The burden then must shift to the employer to articulate some legitimate, non-discriminatory reason for the respondents rejection." (p. 802). We are of the opinion that the Defendant's response to the Plaintiffs' motion for summary judgment fails to address this burden at all, let alone rebut the Plaintiffs' evidence.

The response of the Defendant raises eight issues of defense as follows:

1.

Neither of the named Representative Plaintiffs is currently in the employ of the Defendant. This is not a contested issue of fact. The Plaintiffs admit that both the representative party Plaintiffs have left the employ of Defendant and the question of whether or not their termination from employment was voluntary or forced by discriminatory employment practices of the Defendant is not an issue before us at this time. This is a matter of law concerning standing and it has been held that a former employee may bring an action to enforce rights under this statute claimed to have been infringed. In *Hackett* v. *McGuire Bros. Inc.*, 445 F. 2d 442 [3rd Cir. 1971] this contention was rejected;

> "The national public policy reflected . . . in Title VII . . . may not be frustrated by the development of overly technical judicial doctrines of standing or election or remedies. If the plaintiff is sufficiently aggrieved so that he claims enough injury in fact to present a genuine case or controversy in the Article III sense, then he should have standing to sue in his own right and as a class representative."
>
> (pp. 446, 447).

The Circuit Court continued:

> "A person claiming to be aggrieved may never have been an employee of the defendant. Indeed the Act forbids discrimination not only by employers, 42 U. S. C. § 2000e-2(a)(2), but also by potential employers, 42 U. S. C. § 2000e-2(a)(1), by labor organizations 42 U. S. C. § 2000e(2)

> (c) and by employment agencies, 42 U. S. C. § 2000e (2)(b). An aggrieved person obviously is any person aggrieved by any of the forbidden practices.
>
> (pp. 445-446).

An interesting commentary on the argument asserted to this court was made in *Reed* v. *Arlington Hotel Co. Inc.*, 476 F. 2d 721 [8th Cir. 1973]:

> ". . . if this kind of an individual (a discharged employee, not seeking reinstatement) would be prevented from bringing class actions as the rules permit, there would be a windfall for the employer, and when any such matter was coming up, all they would have to do is discharge the employee . . ."
>
> (p. 723).

2.

The Defendant argues that the representative party Plaintiffs were offered "Claims Adjuster" status and has filed evidence to this effect. This is not denied by Plaintiffs but they contend that the terms of the offer were unacceptable and were made after the charges of discrimination were filed in this case with the United States Equal Employment Opportunity Commission in 1971. We find this to be a disputed issue of fact which may be relevant to the question of damages of the representative party Plaintiffs, but irrelevant to the question of violation of the statute which is before us. Under all circumstances, it is shown by the evidence that the offer of "Claims Adjuster" status was made long after the effective date of the statute in question, after both representative Plaintiffs had been employed in the position of "Claims Representatives" for several years, and after the filing of the Complaints before the EEOC in this matter.

3.

Defendant claims that there is a dispute as to the content of conversations between representatives of the Company and a representative of the Pennsylania Human Relations Commis-

sion. This alleged conversation bears on the Company's motive and intent in offering "Claims Adjuster" status to be named Plaintiffs at the time that it did. We find this completely immaterial to the issue before us at this time because the offer of Claims Adjuster status was not made until the alleged discriminatory practices in violation of Title VII of the Act had continued for several years and the issue had been raised by a Complaint to the Equal Employment Opportunity Commission by the named Plaintiffs.

4.

The Defendant contends that there is a disputed issue of fact on the question of whether or not the qualifications and entrance requirements for the position of "Claims Adjuster" are substantially different from those of "Claims Representative". Although with respect to the duties and responsibilities of each position which we have previously designated as the "equal pay" issue, not before the Court on this Summary Judgment motion, nevertheless we are concerned at this time with whether or not qualified female applicants were excluded from the position of "Claims Adjuster" and its subsequent promotional ladder. The statistical evidence shows that of more than 2,000 persons hired for the position of "Claims Adjuster" up through 1970, not one was female. The Defendant's own representatives have admitted that the representative Plaintiffs in this case were qualified for the position of "Claims Adjuster" at the time of original hiring. Therefore, we find that the Defendant had not met the burden of showing why no female personnel were hired for the "Claims Adjuster" position during the period following the effective date of Title VII until sometime after August 1971 and subsequent to the filing of complaints in the within matter. Plaintiffs contention is further supported by evidence that no female employees occupied the supervisory position of "Claims Supervisor" in the Company which were filled from the ranks of the "Claim Adjusters" until at least 1970. If the jobs were substantially dissimilar as the Defendant claims, the differential in starting salary may be

justified but the total exclusion of women from entry into the higher paid "Claims Adjuster" position would remain as a discriminatory practice, and the promotional policy of the company in drawing all of its supervisory personnel from the ranks of the exclusively male "Claims Adjusters" continued and emphasized the discriminatory effect of the policy. Therefore, we find that the Defendant's argument of a difference in the qualifications or duties of the two positions is immaterial to the Plaintiffs' charge that women were discriminated against in the selection of persons to fill the "Claim Adjuster" position. The company has offered no evidence of any bonafide occupational qualification to justify the complete exclusion of women for this position for over a period of five years, particularly in view of its later determination that some women "Claims Representatives" were qualified for and were offered these positions.

5.

The Defendant argues that it is not clearly established by the evidence that a large number of Defendant's female employees were desirous of and qualified for better positions. We cannot see the materiality of this argument to the question presently before us. The undisputed evidence establishes that after charges were filed in this case, the Defendant did interview its "Claims Representatives" and that 10 of them were offered and accepted positions as "Claims Adjusters." It was further established by testimony of a Company representative that the Company considered one-third of its women "Claims Adjuster." We fail to see how these facts alter the statistical evidence that of the more than 2,000 "Claim Adjusters" hired between 1965 and 1970 none were women, that all of the "Claims Representatives" hired during this period were women, that no women in the job classification of "Claims Representative" was ever promoted to the supervisory position of "Claims Supervisor" during this period; that the Company deliberately engaged in the recruitment of women for the "Claims Representative" position and

represented the "Claims Adjuster" position to be solely a position for male applicants.

6.

The Defendant objects to using the import of the recruiting brochures which were offered in evidence by Plaintiffs and has shown that they have since been superceded by new recruiting literature that is not sex oriented. However, in this matter as in several other matters offered in defense in this case the evidence shows that the Company policy changed after having been continued for a period of approximately five years from the effective date of Title VII and after the threat of the instant litigation became imminent. While the change in Company policy may affect the question of the amount of damages for which it may be liable, we cannot see what effect it has on the liability of Defendant for its policy from and after July 2, 1965.

7.

The Defendant disputes the Plaintiffs' statement that Defendant discouraged acceptances for the offer given to female "Claims Representatives" for re-classification to the position of "Claims Adjuster." We do not find this to be a dispute on a material issue of fact. Whether or not the company discouraged its female "Claims Representatives" from accepting the offered position of "Claims Adjuster", after that occupational classification was opened to women is immaterial to the issue of whether or not the Company practiced discrimination in its employment policies from and after July 2, 1965.

For the purposes of this motion we may assume that the Company did not discourage its female employees from accepting offers to transfer to the classification of "Claims Adjuster."

8.

The Defendants disputes the inferences which the Plaintiffs draw from the facts that no women were promoted to the positions of Branch Office Claims Manager and above. Whether or not there is a dispute from these inferences the undisputed fact remains that no women in the Defendant's organization were promoted to or held these positions, and the Defendant has failed to come forward with any evidence to explain or refute the disparity in promotional practices.

II.

A second issue presented by Plaintiffs' motion for summary judgment may be broadly categorized as the maternity leave issue. This in turn is divided into two sub-issues which we label as

(a) the maternity leave conditions of employment

and

(b) the income protection plan as applied to maternity leave.

(a) *Maternity leave policy.*

Until March 1967, the Company policy was to terminate the employment of a pregnant employee at the end of her sixth month of pregnancy. Thereafter, until September 1970 the policy was to terminate an employee after the eighth month of pregnancy. An employee so terminated could be re-employed, at the sole discretion of the Company, if she re-applied for employment after the birth of her child and if there was a position available.

In September 1970, Company policy was changed to require pregnant employees either to terminate employment or to take a leave of absence at the end of the eighth month and to return to work either within six months of date of termination of em-

ployment or three months from date of delivery, whichever comes first.

In November 1971, Company policy was again changed to permit an employee to work for as long as her physician certifies her ability to work prior to commencing a maternity leave of absence.

(b) *Income Protection Policy.*

The Company provides as a fringe benefit of employment an Income Protection Plan which provides for the payment of income during periods of disability. This plan is funded by insurance benefits. The only long term disability for which no benefits are provided is pregnancy. Furthermore, the Defendant's health insurance plan provides coverage for children of employees who are working for the Company at the time of the birth of the child, and this excludes from coverage the child of an employee who is absent on a maternity leave of absence at the time of the birth of the child.

There is no disputed issue of fact as to the provisions of the maternity leave policies and the fringe benefit coverage of Defendant Company. The question presented to us is solely a matter of law as to the application of Title VII to these undisputed facts.

A threshold question raised by Defendant is that the Plaintiff (sic) have not fulfilled the statutory requirement of exhaustion of the administrative remedy, 42 U. S. C. 2000e-5(e) because the charges filed by the Plaintiffs with the EEOC never mentioned this aspect of the complaint. The policy of the statute is to give the EEOC an opportunity to investigate and conciliate charges of discrimination.

The strongest case urged by Defendant Company is *Tedford* v. *Airco Reduction Co.*, 4 F. E. P. Case 406 [5th Cir. 1972], where the Court of Appeals reversed the dismissal by the District Court of a claim for discriminatory hiring practices because

of mootness. The Appeals Court held that the subsequent hiring of plaintiff did not extinguish plaintiff's claim for back wages. However, the Court of Appeals did sustain the dismissal of claims of a discriminatory seniority system and discriminatory job assignments because,

> "the only factual allegation in Tedford's EEOC complaint was that Airco had refused to hire him as a truck driver because of his race."
>
> * * *
>
> "But giving this factual allegation the most generous construction possible, we still are unable to conclude that the investigation could properly have extended to Airco's seniority system, the driver lists and the like. A charge filed before the EEOC is not a plenary charter for a Commission investigation of every aspect of a company's employment practices. The conclusion is unavoidable that the EEOC has never been called upon to investigate these practices, and accordingly that litigation of their validity in federal court is premature."
>
> 4 F. E. P. Cases, p. 409.

However, this was the same Circuit Court that decided *Sanchez* v. *Standard Brands*, 431 F. 2d 455 [5th Cir. 1970], and the *Tedford* court gave due regard to the *Sanchez* doctrine.

However, the courts have not restricted a plaintiff's suit under 42 U. S. C. 2000e-5(e) to the specific issues raised before the EEOC, nor to the specific findings of the EEOC.

> "Respondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue, 42 U. S. C. §§ 2000-e5(a) and 2000e-5(e). The Act does not restrict a complainant's right to sue to those charges as to which the Commisison has made finding of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts . . . and the courts of appeal have held that, in view of the large volume of complaints before the Commission and

> the nonadversary character of many of its proceedings 'court actions under Title VII are de novo proceedings and . . . a Commission "no reasonable cause" finding does not bar a lawsuit in the case.' *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 800 [C. A. 4, 1971]; *Beverly* v. *Lone Star Lead Construction Corp.*, 437 F. 2d 1136 [C. A. 5, 1971]; *Flowers* v. *Local 6, Laborers International Union of North America*, 431 F. 2d 205 [C. A. 7, 1971]; *Fekete* v. *U. S. Steel Corp.*, 424 F. 2d 331 [C. A. 3, 1970]." *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 798-99 [1973].

In *Sanchez* v. *Standard Brands, Inc.* cit supra, it was explained that in filing a charge with the EEOC an aggrieved person is supplied with a simple one-page charge form in which a row of boxes is provided to check the category of discrimination. We have as Exhibits in the present case the Notice of Charge with (sic) the EEOC gave to Defendant Company for each case which indicates "Basis of Discrimination—Sex", and "Nature of Charge—Promotion—Terms and Conditions." The *Sanchez* court found that no charging party should be barred from the assertion of a charge because of the technicality of his description.

> "Surely the only procedural requirement which should confront a Title VII complainant is the requirement that he state, within the ninety-day period, *facts*, sufficient to trigger a Commission investigation. 431 F. 2d p. 462.

Sanchez continues:

> "At least one district court in this circuit has addressed itself to the question, however, and in our judgment it responded to the question by giving the correct answer. In *King* v. *Georgia Power Co.*, N. D. Ga. 1968, 295 F. Supp. 943, Judge Smith held that the allegations in a judicial complaint filed pursuant to Title VII 'may encompass any kind of discrimination like or related to allegations contained in the charge and growing out of such allegation during the pendency of the case before the Commission.' 295 F. Supp. at 947. In other words, the 'scope' of the judicial complaint is limited to the 'scope' of the EEOC

> investigation which can reasonably be expected to grow out of the charge of discrimination."
>
> 431 F. 2d p. 466.

It appeared from oral argument that Defendant, although it had received the "Notice of Charge of Employment Discrimination", had not seen copies of the original charges filed by Plaintiffs with the Commission before the argument. It appeared that they had never been requested. They were supplied to the court and counsel the day following the argument on this motion. The charge of Plaintiff Mari Ross states, inter alia, "During interview for position as claims representative was subjected to questions regarding marital situation and birth control." Furthermore, the Plaintiffs were required to pursue their charges through an appropriate state agency, the Pennsylvania Human Relations Commission, which on July 1, 1971, sent to Defendant a Complaint which recited, inter alia:

> "The complainants further allege that female applicants, as a condition of hire, are subjected to inquiries about anticipated marriage and family size, while men are not similarly evaluated as a condition of hire."

(*Aune*, Deposition, Exhibit 1).

The court believes that the Representative Plaintiffs have properly employed the administrative procedures of Title VII which are a prerequisite to suit in the district court, they have properly raised the issue of sex discrimination in the "terms and conditions" of employment, that they specifically raised allegations of discrimination in respect to marital status and family planning sufficient to satisfy the administrative investigation requirement for raising the specific question of sex discrimination in maternity leave and pregnancy disability income policies in the present lawsuit.

As a point of departure in considering the merits of Plaintiffs' charges of sex discrimination with respect to Defendant's maternity leave and pregnancy disability income protection policies

it might appear to the lay mind that we are treading on the brink of a precipice of absurdity. Perhaps the admonition of Professor Thomas Reed Powell to his law students is apt; "If you can think of something which is inextricably related to some other thing and not think of the other thing, you have a legal mind."

We are dealing with a statute enacted by the Congress of the United States which says:

> "It shall be unlawful employment practices for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's . . . sex; or
>
> (2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex."
>
> 42 U. S. C. 2000e-2(a)

The defendant argues that its policies with regard to maternity leave and income protection for disability excluding pregnancy are not sex discriminatory because pregnancy is "sui generis" and thus subject to special treatment.

We believe that the court may take judicial notice of certain well known facts and statistics to illustrate the problem. We have taken our statistics from the United States Census figures as published in the 1974 edition of the World Almanac. In 1970, according to the census figures, there were 105,000,000 women and 100,000,000 men in the United States. In 1972 there were 31,000,000 women and 51,000,000 men, sixteen years of age and upwards, employed in the United States. Women between the ages of fourteen through forty-four amounted to 43.5% of the total female population or 46,657,000 women, which we equate with the childbearing age. There

is a necessary overlapping of the 31,000,000 women in the work force sixteen years of age and older, and the 45,000,000 women in the childbearing ages of fourteen to forty-four. There were 3,191,000 live births in the United States in the year ending June 30, 1973 which produces a birth rate of about fifteen per 1,000 of total population, but a fertility rate of sixty-nine births per 1,000 women fifteen to forty-four years of age. We recognize that more precise statistics are available but we are not concerned with minutiae and only recite these figures to illustrate the scope of the problem. Pregnancy is a natural condition. It is an expectable condition, it is a statistically foreseeable condition, and ultimately it is a necessary condition. It is a condition limited to women, not by statutory law or custom, but by biological law. If three-eighths of our employee working force consists of women, and their age group necessarily overlaps in large measure the childbearing age group, pregnancy is certain to occur in a statiscally expectable number of employees. We have no doubt that a large insurance company is well aware of the precise statistics. We further note from this case that the defendant's recruiting policies for female technical employees in its claims department was aimed at young women finishing their college education, and that its promotional policy was to advance personnel within its own ranks and not draw upon outside sources. This policy would only increase the incidence of young women of childbearing age among the female employees of a growing business organization such as Defendant, which hired over 2,000 new female claims representatives in a five year period.

Because pregnancy is a natural, expectable, and societally necessary condition, which is certain to occur in a statistically predictable number of women in the labor forces, we see no merit in Defendant's argument that it may be excluded from equality of treatment in conditions and benefits of employment because it is a voluntary condition. Whether voluntary or not, it occurs

with certainty and regularity. The distinction drawn between one hiring policy for men and another for women—each having pre-school age children—was rejected by the Supreme Court in *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 544 [1971] where there was no showing that the condition in question is a bonafide occupational qualification necessary to the operation of that particular business or enterprise.

The United States Equal Employment Opportunity Commission which is the administrative body created by Title VII to administer the Act, has issued the following Guidelines with respect to the question at issue:

> § 1604.10 Employment policies relating to pregnancy and childbirth.
>
> (a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in *prima facie* violation of Title VII.
>
> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.
>
> (c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity. 29 C. F. R., Labor Chapter XIV, Part 1604, As Amended (As of March 31, 1972).

§ 1604.9 Fringe benefits.

(a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

29 C. F. R. *idem*.

We give full recognition to the principle urged upon us that the EEOC Guidelines, 29 C. F. R. § 1604.10, effective April 5, 1972, do not have the force of law in the sense that the "regulations" or "subsantive rules" of an administrative body authorized by statute to promulgate regulations to implement existing law have a binding effect. We also recognize that the Guidelines are interpretive statements of what the administrative officer thinks the regulations mean. *Gibson Wine Co. Inc.* v. *Snyder*, 194 F. 2d 329 [D. C. Cir. 1951]. We are not compelled to follow them, but some deference is due. *Espinoza* v. *Farah Manufacturing Co.*, 462 F. 2d 1331, 1335 [6th Cir. 1972].

Our own Court of Appeals states it more strongly:

> "Such an administrative interpretation is entitled to great deference. *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 433-434, 91 S. Ct. 849, 28 L. Ed. 2d 158 [1971]; *Udall* v. *Tallman*, 380 U. S. 1, 85 S. Ct. 792, 13 L. Ed. 616 [1965]. That the guideline was not promulgated until after this suit was initiated is of no moment. Rights which came into being when the Act was passed are not abrogated by administrative interpretation. *Bartmess* v. *Drewrys* U. S. C., Inc. 444 F. 2d 1186 [C. A. 7], *cert. denied*, 404 U. S. 939, 92 S. Ct. 274, 30 L. Ed. 252 [1971]."
>
> "A reading of the statute convinces us that the commission's interpretation furthers the legislative purpose of the Act and is consistent with the plain meaning of the language employed.

> 'Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1198 [C. A. 7], *cert. denied*, 404 U. S. 991, 92 S. Ct. 536, 30 L. Ed. 2d 543 [1971]." *Rosen* v. *Public Service Electric and Gas Co.*, 477 F. 2d 90, [3rd Cir. 1973], at pp. 94-5.

The only current provision of the Defendant's maternity leave policy under attack is the provision that the employee who is granted a leave of absence for maternity must return to work on a date certain or be terminated from employment. Plaintiffs' Complaint is zeroed in on the target that this limitation on leave of absence for temporary disability is only applied to maternity cases. There is no such requirement for any other disability.

Because state and local governments were exempted under Title VII until 1972, there are few Title VII cases involving pregnancy that give us guidelines, but the question has arisen frequently under cases presenting claims of denial of equal protection or denial of civil rights under color of state authority. We believe that Title VII standards are more compelling on a private employer in view of the express statutory mandate upon employers and the absence of the question of a "rational basis" for classification by which a state statute is measured. *Dandridge* v. *Williams*, 397 U. S. 471 [1970]. While a fixed state policy of classification may survive an equal protection attack it may still be violative of Title VII. See *Schattman* v. *Texas Employment Commission*, 459 F. 2d 32 [5th Cir. 1972], and *Newmon* v. *Delta Airlines, Inc.*, 475 F. 2d 768, [5th Cir. 1973].

A district court in the Fifth Circuit has recognized that:

> *"Schattman*, . . . turned upon a divided Appellate Court's interpretation of the federal statute as it then read on the question of its exclusion from coverage of state employers and employees." *Vick* v. *Texas Employment Commission*, 6 EPD 5990 [S. D. Tex. Aug. 30, 1973].

However, the *Vick* case found this impediment to jurisdiction removed by the 1972 Amendment to Title VII, and proceeded to find that the state's denial of unemployment benefits on the grounds that the last trimester of pregnancy rendered a woman unavailable for work, violated the provisions of Title VII.

> "While the expectancy of life confined and incident to female pregnancy involves many delicacies of personal, institutional and societal interest, *Roe* v. *Wade*, 410 U. S. 113, 41 L. W. 4231 (January 22, 1973), such a natural and necessary female condition cannot be a basis for categorical discrimination in light of *Phillips* and its plain interpretation of Title VII of the Act." *Vick*, cit. *supra*, 5 EDP p. 5992.

Nevertheless, we can take some guidelines from the Equal Protection Clause cases dealing with pregnancy.

Judge Brown in his dissent in *Phillips* v. *Martin Marietta Corp.*, 416 F. 2d 1257 [5th Cir. 1969], vacated *per curiam* 400 U. S. 542 [1972] noted with respect to that case, where women with pre-school age children were denied employment, but not men:

> "The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody —and this includes Judges, Solomonic or life tenured— has yet seen a male mother. A mother, to oversimplify, the simplest biology, must then be a woman". 416 F. 2d p. 1259.

To the argument that pregnancy is a voluntary status, the court in *Buckley* v. *Coyle Public School System*, 476 F. 2d 92 [10th Cir. 1973] says:

> "The fact, if it be a fact, that pregnancy is a voluntary status really has nothing to do with the question. The point is that the regulation penalizes the feminine school teacher for being a woman and, therefore, it must be condemned on that ground." 476 F. 2d at p. 95.

The Court of Appeals reversed the District Court's dismissal

and remanded the case to the District Court for determination of a compelling state interest to justify the regulation.

In *Green* v. *Waterford Board of Education*, 473 F. 2d 629, [2nd Cir. 1973], the Court of Appeals reversed a District Court's dismissal of a complaint alleging that an inflexible maternity leave policy denied equal protection. Even though the District Court has found a rational basis for the school board's action, the Court of Appeals found that the state's interests were not sufficiently promoted by rule to justify the arbitrary and inflexible regulation applied to pregnancy as distinguished from other disabilities.

> "The heart of plaintiff's case is that disqualifying a physically capable woman from working because of a condition related solely to her sex is unconstitutionally discriminatory. Plaintiff admits the obvious, that men do not become pregnant, but points out that men, being human, are also subject to crises of the body, some of which, like childbirth, give ample warning: A cataract operation or a prostatectomy, for example, may be planned months ahead. Because male teachers are not forced by defendant-Board to take premature leave because of a known forthcoming medical problem, female teachers should not be treated differently. Thus stated, the argument is persuasive, even compelling. One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed." (p. 634)

See also the following Equal Protection clause cases involving maternity leave:

> *LaFleur* v. *Cleveland Board of Education*, 465 F. 2d 1184 [6th Cir. 1972], *cert. granted* 93 S. Ct. 1921 but Cf. *Cohen* v. *Chesterfield County School Board*, 474 F. 2d 395 [4th Cir. 1973], *cert. granted* 93 S. Ct. 1925.

Defendant has interposed a defense of good faith reliance upon an administrative interpretation, particularly in its defense on the income protecton exclusion policy here. This may be a matter to consider when the question of affirmative relief or

back pay are determined but we cannot see its application to the immediate question of the inflexible maternity leave standard. During the period prior to the Guidelines published in March 1972, there were no guidelines or opinions issued by the EEOC. 29 U. S. C. 2000e-12(b) (Sec. 713(b) of the Act) provides that "no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or commission complained of was in good faith, in conformity with and in reliance upon any written interpretation or opinion of the Commission."

We do not believe that the various opinion letters referred to in the brief of *amicus curiae* United States Chamber of Commerce, with respect to the inclusion of maternity benefits in an insurance plan meet the requirements of Sec. 713; there is no evidence that defendant relied upon them, they were not addressed to the defendant, and do not otherwise conform to the requirements of a written opinion under which the defense of reliance may be asserted. *United Papermakers and Paperworkers, etc.* v. *United States,* 416 F. 2d 980 [5th Cir. 1969]; *Sprogis* v. *United Air Lines, Inc.,* 444 F. 2d 1194 [7th Cir. 1971].

The maternity leave policy of the company which since 1970 has granted a leave of absence for six months from the last date of work before delivery, or for three months from the date of delivery, whichever comes first, has no relation to the fitness of any individual female to perform the functions of her job.

The defendant has not alleged, nor has it offered any evidentiary material to establish that there is a disputed issue of fact dependent upon a bona fide occupational qualification. Such a bona fide occupational qualification is a defense to a charge of discrimination where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. This has been narrowly construed by the courts. In *Weeks* v. *Southern Bell Telephone*

and Telegraph Company, 408 F. 2d 228 [5th Cir. 1969] the Court held this must give the employer "a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." In *Rosenfeld* v. *Southern Pacific Co.,* 444 F. 2d 1219 [9th Cir. 1971] the court held the exclusion of women justified only when "the sexual characteristics of the employee are crucial to the successful performance of the job, as they would be for the position of a wet-nurse." Under *Rosenfeld,* if one woman can do the job the employer cannot impose a blanket rule denying all women the opportunity.

Under the company policy any female who cannot return to her job within three months of delivery of her child is automatically terminated. No other disability is cause for such automatic termination. "For a woman, however, the effects of pregnancy and pregnancy-related illness are debilitating in much the same way as the physical and mental conditions that are included within the scope of the disability insurance program." *Aiello* v. *Hansen,* 359 F. Supp. 792 [N. D. Cal. 1973].

We conclude, as a matter of law, that the maternity leave policy in effect in Defendant Company at the present time and since September 1970 in the respect in which it requires a female to return to work within three months of the date of delivery of her child, or six months from the beginning of her maternity leave, whichever date is earlier, or face termination of employment, is violative of Sec. 703, of Title VII of the Civil Rights Act of 1964, as amended, in that such policy discriminates against female employees on the basis of sex.

Because only this present policy is still in existence, injunctive relief as to this practice is appropriate at this time.

We further find that all prior company policies in effect since July 2, 1965, which compelled pregnant female employees to leave employment at a fixed period of pregnancy before delivery were likewise violative of the Act, and the company policy in effect since July 2, 1965 which denied reemployment because

of pregnancy and maternity were violative of the Act. Because these practices have ended there is no need for injunctive relief, and the question of the intentional nature of the violation and the appropriate relief will be considered in a subsequent stage of these proceedings.

Some additional considerations must be weighed with respect to plaintiffs' claim that the Income Protection Plan of Defendant company is discriminatory to female employees. The Company provides its employees with a contributory insurance plan for continuation of income for a "long term illness", i.e., an illness requiring treatment by a doctor of eight or more calendar days which causes absence from work. Such "benefits are not payable for disability due to occupational injury or to sickness covered under Workmen's Compensation Insurance; for disability due to pregnancy; for a disability in excess of 104 weeks; or for a disability during which you were not treated by a physician licensed to practice medicine."

Pregnancy is the only disability, not within the other exceptions, not covered by the Income Protection Plan. Pregnancy is a condition limited to women. Conditions limited to men, such as prostate troubles, are not excluded, nor is any exclusion provided for a number of illnesses whose incidence among males is greatly predominant (i.e. gout 19 to 1; the Merck Manual, 10th ed. 1961).

The brief of the United States Chamber of Commerce as *amicus curiae* cites cost of the program if pregnancy were included, as a justification for exclusion.

We must emphasize the distinction made by the Guidelines, § 1604.10(b) that it is "disabilities caused or contributed by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom" which for job-related purposes are to be treated as temporary disabilities. They do not cover leave for child rearing, but only for job disability. No evidence has been presented to us by Defendant as to the average duration of pregnancy disability. Again, we have a difficult time in freeing ourselves from

stereotype thinking. We note that the Defendant's policy for maternity leave prior to delivery has accommodated itself from a fixed number of months prior to delivery to the recognition that an employee may work prior to delivery as long as she is able to do the job. Return to work may be made as soon after delivery as she is able to do the job. We may assume from a general knowledge of the conditions of life, that in the normal or usual pregnancy, the period of disability will be relatively short. There is nothing in this record to show, and nothing in our general experience with life indicates that the job-related incidence of disability for pregnancy is any greater or any less than that for a prostatectomy.

The EEOC Guidelines provide, § 1604.9 Fringe Benefits, (e):

> "It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other."

While cost may be a business purpose, and certainly to add pregnancy disability to the insurance program will cost more, it can only be a defense in a Title VII action where

> ". . . there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact, the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact. (footnotes omitted.) *Robinson* v. *Lorillard Corporation,* 444 F. 2d 791, 798 [4th Cir. 1971].

With respect to the argument of increased costs there is no statutory requirement that Defendant company offer any particular disability benefits, in any specific amount, or of any particular duration. The only requirement is that there be no inequality based on sex. Adjustments in the benefit plan to

achieve equality are a recognized means of achieving that end. *Rosen* v. *Public Service Electric Co.* cit. supra (p. 95); *Hayes* v. *Potlatch Forests, Inc.*, 465 F. 2d 1081 [8th Cir. 1972].

> "The increased costs could be accommodated quite easily by making reasonable changes in the contribution rate, the maximum benefits allowable, and the other variables affecting the solvency of the program." *Aiello* v. *Hansen*, 359 F. Supp. 792, at p. 798 [N. D. Cal. 1973].

A final requirement for a finding of violation of Title VII is that the court must find that defendant "has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint" in order to issue an injunction or to order such affirmative action as may be appropriate. While we are not now concerned with any question of relief in which the questions of back pay or reinstatement may be considered, certain continuing policies of defendant are subject to immediate injunctive relief, and require a finding of international (sic) action. Defendant has raised no question of international (sic) violation, except as to its defense of good faith reliance on administrative interpretation which we have found insufficient. The term "international" (sic) in this Act means that the Defendant intended to do what it did, not that there was a wilful and deliberate intention to violate the law.

> ". . . intentional unfair employment practices are those engaged in deliberately and not accidentally. No willfulness on the part of the employer need be shown to establish a violation of Sec. 706(g)." *Kober* v. *Westinghouse Electric Corp.*, 480 F. 2d 240, 246 [3rd Cir. 1973].

We, therefore, find that the violations of Title VII of the Act herein charged were intentional within the terms of the statute.

We, therefore, conclude that as to the issues raised by Plaintiffs' Motion for Partial Summary Judgment, there is no genuine issue as to material fact and that summary judgment interlocutory in character should be entered on those issues.

Because the evidentiary materials show that at certain times subsequent to the effective date of the Act, or subsequent to

the filing of the administrative charge or the within Complaint the Defendant has ceased or discontinued the discriminatory practice, injunctive relief is not appropriate as to those practices. *Kober* v. *Westinghouse Elec. Co.*, supra, p. 250.

As to continuing practices which violate Title VII preliminary injunctive relief at this time is appropriate.

The question of other affirmative relief for past actions is not now before us. The Court is mandated to issue "such affirmative relief as may be appropriate." *Kober*, cit supra. This will depend upon the evidence to be presented on the individual claims, which may be considered at the time of trial of the "equal pay" issue not here considered.

IN THE UNITED STATES DISTRICT COURT

* * (Caption—72-169) * *

ORDER

Now this *9th day of January, 1974*, Plaintiffs having moved for partial summary judgment on certain of the issues raised by the pleadings in this case, and having produced evidentiary materials in support of said motion, and the Defendant having responded, and the court having reviewed briefs and arguments of the parties and of the *amici curiae*.

The court finds that there is no genuine issue of material fact as to the issues hereinafter set forth, and that partial summary judgment, interlocutory in character, on the following issues of fact may be entered as a matter of law, it is

Therefore Ordered, in accordance with the foregoing Opinion, that Defendant be found to have violated the provision of Title VII of the Civil Rights Act of 1964, 42 U. S. C. 2000(e) et seq., and Sec. 703(a)(91) of said Title VII, in that Defendant has failed or refused to hire and has otherwise discriminated against Plaintiffs and member of the class of female technical employees of the Claims Division of the Liberty Mutual Insurance Company because of their sex in the following respects:

1. From and after July 2, 1965 it failed and refused to hire otherwise qualified female applicants for the entry level position of "Claims Adjuster" in its Claims Department.

2. From and after July 2, 1965 it failed and refused to transfer or promote otherwise qualified female applicants from the position of "Claims Representative" to the position of "Claims Adjuster" in its Claims Department.

3. From and after July 2, 1965 it failed and refused to promote otherwise qualified female employees to the position of

"Claims Supervisor" and positions superior to that position in its Claims Department.

4. That from and after July 2, 1965 the Defendant Company failed and refused to allow pregnant employees, otherwise able to perform the duties of their employment, to continue their employment beyond a certain term of their pregnancy, after which their employment was terminated.

5. That the violations of Title VII found in paragraphs 1, 2, 3, and 4 above have ceased as a matter of Company practice and no injunctive relief with respect to these issues is appropriate.

6. That from and after July 2, 1965 the Defendant Company required female employees to return to work within three (3) months of delivery or within six (6) months of the start of maternity leave, or be dismissed from employment, without regard to their ability to perform the duties of their employment.

7. That from and after July 2, 1965 the Defendant Company denied the benefits of the disability income protection plan to female employees who otherwise met the conditions of the plan for any disability related to pregnancy or childbirth.

8. That the violations of Title VII recited in paragraphs 6 and 7 above are continuing violations and are the proper subject of injunctive relief. The court will consider the terms of any proposed preliminary injunctive order with respect to these violations submitted by the Plaintiffs in this case.

9. The questions of further appropriate relief to the individual Plaintiffs and members of their class will be determined by the court in further proceedings.

10. The question of liability and appropriate relief for the issue of equal pay for equal work between male and female employees is reserved for further proceedings.

GERALD J. WEBER
United States District Judge

IN THE UNITED STATES DISTRICT COURT

* * (Caption—72-169) * *

MOTION FOR RECONSIDERATION

Now comes Liberty Mutual Insurance Company and requests that the Court reconsider that portion of its Order of January 9, 1974 that found that the Defendant's policy of requiring female employees to return to work within three months of delivery or be terminated and its policy of denying the benefits of the disability income protection plan to female employees for any disability related to pregnancy or childbirth are violations of Title VII of the Civil Rights Act of 1964, as amended and states as follows:

1. On December 31, 1973, the Honorable Albert Henderson of the United States District Court for the Northern District of Georgia stated in *Newman* v. *Delta Air Lines, Inc.*, Civil Action No. 15681,[1] that "pregnancy is neither a sickness nor a disability. In the first place, pregnancy is, in most cases, a voluntarily imposed condition and the fact of its existence demonstrates that a woman is quite healthy and normal, since sick is defined as 'affected with disease; not well or healthy, ill, ailing, indisposed.' A reasonable approach dictates the holding that pregnancy is not sickness in the usual sense of the word." The defendant's policy pays for disability resulting from injury or sickness. Based on the holding in Delta, the defendant's program would be lawful.

2. The decision of the United States Supreme Court in *Cleveland Board of Education* v. *LaFleur*, Nos. 72-777 and 72-1129 does not decide whether or not the defendants "cut-off" is proper because:

A. LaFleur is a 14th Amendment case and doesn't decide the matter based on Title VII.

1. Exhibit A to this Motion.

Furthermore, the defendant cannot suggest to the Court what a proper cut-off period would be because:

A. There are no statistics to base a suggestion on, and

B. Even if there were statistics they would be of no value because no employer has ever paid disability benefits while the female was on pregnancy leave of absence and, thus no one can say how long the female will stay out. Furthermore, because employees of the defendant can, in some situations make as much or more money by receiving disability income, it can be assumed that females on pregnancy leave of absence will remain at home longer than normal.[2]

C. Because of the vast national importance of both of the "pregnancy" issues it is requested that the Court, pursuant to 28 U. S. C. § 1292(b) amend its order to contain the statement required so that defendant may seek to take a permissive appeal to the United States Court of Appeals on all the "pregnancy" issues. The appearance of both amicus and the seriousness of the issues as they affect not only the defendant, but all employers in the United States require that such a statement be contained; if the Court is not disposed to amend its order to contain the § 1292(b) statement then, it is requested that if an injunction is issued that the Court stay it pending appeal pursuant to 28 U. S. C. § 1292(a). The fact that any injunction will be stayed will not result in irreparable injury and the defendant can maintain a list of employees in the claims department who will from January 9, 1974 be affected by its "pregnancy" rules.[3]

2. This is not to be critical, but human nature dictates that if the female can be paid for staying home, she will.

3. As the Court knows, a Notice of Appeal has already been filed. It was filed because the Court stated it was going to enjoin the practices of the defendant. An interesting question has been presented, i.e. whether that is the granting or denying of an injunction so an appeal can be taken. The defendant would argue that the Court's statement satisfies the jurisdictional requirements but clearly the Court, pursuant to Rule 62(c) can suspend the injunction pending review.

D. If the Court is disposed to enter an injunction, the one proposed by Plaintiffs' is inappropriate because: (i) Only paragraphs 1 and 2 are appropriate to the facts of this case and (ii) no affirmative relief should be contained until such time as the Court of Appeals or the Supreme Court fashions a proper remedy.

Dated: January 30, 1974

Respectfully submitted,

LIBERTY MUTUAL INSURANCE COMPANY
By: /s/ KALVIN M. GROVE
LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

ROBERT A. PENNEY
175 Berkeley Street
Boston, Massachusetts 02226

CLEM R. KYLE
1305 Clark Building
Pittsburgh, Pennsylvania 15222

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion For Reconsideration was mailed on January 30, 1974 to:

Howard A. Specter, Esquire
Litman, Litman, Harris & Specter
Grant Building
Pittsburgh, Pennsylvania 15219

James F. Bennett
Equal Employment Opportunity Commission
Room 2038 A, Federal Building
1000 Liberty Avenue
Pittsburgh, Pa. 15222

Gerard Smetana
925 S. Homan Avenue
Chicago, Illinois

Julian Schreiber
120 South LaSalle Street
Chicago, Illinois

Walter P. DeForest
747 Union Trust Building
Pittsburgh, Pa. 15230

Milton Smith, General Counsel
Chamber of Commerce of U. S. A.
1615 H. Street, N. W.
Washington, D. C.

/s/ KALVIN M. GROVE
Kalvin M. Grove

UNITED STATES DISTRICT COURT
Northern District of Georgia
Atlanta Division

MRS. LINDA NEWMON,
vs.
DELTA AIR LINES, INC.

Civil Action
No. 15681

ORDER

This is a class action brought pursuant to Title VII of the Civil Rights Act of 1964 (hereinafter referred to as the "Act") 42 U. S. C. § 2000e *et seq.*, for injunctive relief, back wages and restoration of benefits because of alleged sex discrimination by the defendant, Delta Air Lines (hereinafter referred to as "Delta") in the effectuation and operation of its maternity leave policy.

The plaintiff was employed by Delta for almost ten years, from December 1, 1960 to June 15, 1970. During this time she held clerical assignments in the reservations department including that of "Quick Reference Clerk" for five years, reservationist for two years and finally, "Information Clerk", a position she retained until she began her maternity leave. Under Delta's maternity leave policy for ground employees, the plaintiff was required to go on unpaid maternity leave at the end of the fifth month of pregnancy. Upon leaving she received accrued vacation pay but, in accordance with the airline's policy, was not entitled to accrued sick pay, additional seniority or group insurance except that portion covering child birth expenses.

Six weeks after the birth of her child, and with her physician's approval, she notified her supervisor of her desire to return to work but was informed that no position was available which was suitable to her qualifications. She was further advised that

her successor, who was to start maternity leave November 14, 1970, would not be replaced because of economic difficulties Delta was experiencing at that time. After eight months of contacting Delta by telephone and in person, the plaintiff filed, on May 31, 1971, a charge of sex discrimination against Delta with the Equal Employment Opportunity Commission (hereinafter referred to as "EEOC"). On August 15, 1971, she amended the charge for purposes of verification. She received her 30-day "right to sue" letter from EEOC on September 7, 1971 and filed this action shortly thereafter.

The plaintiff's motion for preliminary injunction, reinstatement and back pay was heard and denied by the court on May 31, 1972. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed and remanded the case for trial. *Newmon* v. *Delta Air Lines, Inc.*, 465 F. 2d 768 (5th Cir. 1973).

At the hearing on the preliminary injunction, the plaintiff learned that her reinstatement rights would not be affected by taking other employment. She thereafter sought work with other Atlana-based airlines but was unsuccessful because of the general "slow down" in the industry. Further efforts to find a job with other businesses nearer her home proved fruitless except for one offer which she rejected for reasons of personal convenience. Finally, on May 14, 1973, she was offered reinstatement by Delta to a shift assignment in the reservation department, the position she now holds.

Delta's maternity leave policy was developed through four distinct periods of time. Prior to 1958 all Delta female ground employees who became pregnant were required to resign their jobs at a date agreed upon by the employer and her supervisor. Because of problems inherent in such a system, the policy was changed in 1958 to provide for termination at the end of the fifth month of pregnancy. Once on leave, the employee accrued no seniority and received only vacation pay then due. Reinstatement was dependent upon there being an opening suitable

to her qualifications. In 1968, the policy was again modified to permit a return to work on a preferred basis within 90 days after the birth of the child with no loss of seniority if positions were available. This was the maternity leave policy which governed the plaintiff's employment status. Prior to 1970 stewardesses were required to resign as soon as they learned of their pregnancy, but in 1970, this plan for stewardesses was revised to correspond more favorably to the 1968 ground personnel position. The stewardesses, however, were still required to leave their jobs immediately upon learning of their pregnancy. During leave, the stewardesses accrued three months seniority. The last maternity leave policy revision became effective in November, 1972 and allows female ground employees to work through the eighth month of pregnancy and to continue accruing seniority during the pregnancy absence.

The issues raised in this case as set forth in the pre-trial order are as follows:

1. Whether the defendant's maternity leave policy constitutes sex discrimination under Section 703 of the Civil Rights Act of 1964 in the following respects:

(a) By requiring all ground employees to take leave automatically by the end of the specified month of pregnancy without regard to the abilities of individual women to continue working into the later stages of pregnancy;

(b) By denying pregnant employees the use of sick leave or any other employment benefits normally available to those on sick leave, i.e., accrual of seniority and the use of medical insurance benefits;

(c) By permanently replacing pregnant women but giving them priority for future openings in similar positions and preserving their benefits which are based on length of service;

(2) Whether all physical conditions which temporarily disable employees from working should be treated by employers in exactly the same manner;

(3) Whether the EEOC's guidelines of 1972 pertaining to maternity leave are entitled to great deference in this case.

Before giving consideration to the merits of the case there remain three motions filed immediately prior to the trial which must be decided: (1) the plaintiff's motion for certification of the class, (2) the motion of Mrs. Dian T. Thompson, a Delta stewardess, to intervene, and (3) the plaintiff's motion to sever pursuant to Rule 42, Fed. R. Civ. P.

The plaintiff defines the class she seeks to represent as "all female employees of defendant Delta . . . based at any Atlanta facility, whose employment with the defendant and employment related benefits were broken by furlough, discharge or forced resignation occasioned by reason of pregnancy from May 13, 1969 until present." It is alleged that the company's maternity leave policy applies to all women employees automatically and without exception.[1] The plaintiff contends that Rule 23(a)(2), Fed. R. Civ. P. is satisfied since her claims are typical of those of the class and therefore common questions of law and fact are involved. Additionally, she argues that the purported class satisfies the Rule's numerosity requirement[2] and she will fairly and adequately represent the class since her counsel is experienced and competent in class litigation.[3] Finally, she asserts that the proposed class is manageable yet large enough to be treated as such.

---

1. As previously indicated, the Delta maternity policy as it relates to stewardesses varies from its application to ground employees in that forced maternity leave begins at an earlier date. The plaintiff notes that due to "the unusual demands of that position" no attack is made on the timing of this rule. (Plaintiff's brief in support of the motion, p. 4, fn. 4.)

2. There appears to be some confusion with respect to the exact number of members in the purported class. In the motion for determination of the class the plaintiff alleges there are 193 members. However, in the pre-trial order 198 women are in the class.

3. Johnson v. Ga. Highway Express, Inc., 417 F. 2d 1122 (5th Cir. 1969).

The defendant replies that (1) the mandate of Rule 23(a)(4), Fed. R. Civ. P. is not satisfied because the plaintiff cannot fairly protect the interests of the class, (2) the plaintiff is without standing to attack Delta's denial of sick leave benefits, (3) the plaintiff did not file a timely charge on the denial of sick pay, (4) there are not questions of law and fact common to the entire class membership as proposed and (5) proper notice has not been given to the class pursuant to Rule 23(c)(2), Fed. R. Civ. P.

To be maintainable as a class action, a suit generally must meet all the requirements set forth in Section 23(a) and also fall within one of the subsections of 23(b) of the Federal Rules of Civil Procedure. *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 555, 561 (2d Cir. 1968). First, the plaintiff must establish the following requirements of Rule 23(a):

> (1) the class is so numerous that joinder of all members is impracticable.
>
> (2) there are questions of law or fact common to the class.
>
> (3) the claims . . . of the representative parties are typical of the claims . . . of the class.
>
> (4) the representative parties will fairly and adequately protect the interest of the class.

Second, 23(b)(3) requires that, additionally:

> the court finds that the questions of law or fact common to the members of the class predominates over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the class in a particular forum; (d) the difficulties likely to be encountered in the management of a class action.

There are two prerequisites to the institution of a Title VII class action: (1) Rule 23 Fed. R. Civ. P. must be satisfied and (2) the issues raised must be those the plaintiff has standing to raise and in fact did raise before the EEOC. *Otis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496 (5th Cir. 1968). See also *Smith* v. *North American Rockwell Corp.*, 50 F. R. D. 515, 524 (N. D. Okla. 1970). The requirement of "exhaustion" before the EEOC, and thus standing to file a civil action, is not interpreted to mean that all the niceties of legal pleadings must be fulfilled. Usually, persons filing EEOC complaints are not schooled in legal technicalities and some flexibility must be allowed. The standard for EEOC exhaustion is ably described in *King* v. *Georgia Power Co.*, 295 F. Supp. 943, 947 (N. D. Ga. 1968):

> The correct rule is that the complaint in the civil action is confined to those issues the original complaint has standing to raise, but may properly encompass any such discrimination like or reasonably related to the allegations of the charge and growing out of such allegations during the pendency of the case before the Commission. [footnote omitted]
>
> This rule, broadly speaking, in effect limits the civil action to that range of issues that would have been the subject matter of the conciliation efforts between EEOC and the employer. If the civil action were not so limited, then the primary emphasis of this Title would be circumvented, i.e., an emphasis upon voluntary settlement of all issues without an action in the District Court. . . . It should be emphasized that the EEOC is not free to manipulate the scope of a case beyond the bounds herein expressed. The expansion of a particular charge is limited to the issues that a partciular complainant has standing to raise. . . .

Applying this rule to the present case, the plaintiff has sufficiently submitted her claims to the EEOC. The issues presented here are those plaintiff has standing to raise and *"encompass any such discrimination like or reasonably related to the allegations of the charge and growing out of such allegations during the*

pendency of the case before the Commission." (Emphasis added.) *King* v. *Georgia Power Co., supra,* at 947; *Danner* v. *Phillips Petroleum Co.,* 447 F. 2d 159, 162, *reh. en banc den.,* 450 F. 2d 881 (5th Cir. 1971). Accordingly, the second requirement of *Oatis* for a Title VII class action is met.

It further appears that the requisites of Rule 23, Fed. R. Civ. P. as hereinbefore delineated are generally fulfilled, The fact that almost 200 female employees have been affected by the alleged discriminatory acts of Delta is sufficient to justify class treatment of this case. See generally 3B Moore's *Federal* Practice, ¶ 23.5, pp. 23-271 *et seq.*

However, plaintiff's construction of the class presents a different problem. It is elementary that questions of law and fact common to the class must exist.[4] The persons presumably constituting this class may be categorized into two distinctive groups: (1) flying personnel and (2) ground employees. The plaintiff and the majority of those she seeks to represent are ground personnel. While the challenge to the Delta maternity leave policy involves some common issues of law affecting all female employees, it is clear that there are important factual differences pertaining to stewardesses. In the first place, the terms of the leave policy vary between the categories of personnel as previously noted. The separate job demands of the two create obvious factual deviations critical to a determination of the issues here. The stewardesses must necessarily work in confined spaces—aircraft cabins, they are required by the nature of their jobs to stand, stoop and walk continually whereas ground employees generally have opportunities to sit or recline when necessary; medical attention for the stewardesses is not available; and the danger of accident and injury in flight to the mother and/or child is greater for pregnant flight attendants.

4. While some courts and authorities question the need of Rule 23(a)(2) due to the addition of Rule 23(b), there is no compelling reason to disregard its presence or lessen its importance. See, e.g., 3B Moore's Federal Practice, ¶ 23.06-1, pp. 33-301-303 and cases cited therein.

These job variances are indicative of the different facts necessary to be developed in order to establish whether the Delta plan is discriminatory. Thus, it is apparent that the plaintiff's class should be limited to ground employees.

Without the inclusion of flying personnel, the claims of the plaintiff would be typical of those of the re-defined class. Rule 23(a)(3). The plaintiff can adequately represent and thereby sufficiently protect the interests of the new class, Rule 23(a)(4).[5] Furthermore, there are co-extensive interests between the plaintiff and the class of ground employees.[6] Therefore, the class must be confined to those female Delta employees classified as ground personnel.

With the flying personnel excluded from the class sought to be represented by the plaintiff the conditions of Rule 23(b)(3) are satisfied. The common questions of law and fact now predominate over any individual issues in the case. The plaintiff's motion to certify the class is granted in part within the limits hereinbefore defined.

From the foregoing discussion it is apparent that the motion of Mrs. Dian T. Thompson to intervene cannot be granted because of the difference in the factual situations and it is therefore denied.

In addition, Mrs. Thompson does not have standing to challenge the Delta maternity leave policy. According to the affidavit of John Dodd, the supervisor of the Atlanta-based stewards and stewardesses, the movant resigned on August 31, 1970 because she was to be married. Attached to the affidavit is a file copy of an intercompany memorandum from Mrs. Thompson, nee Tucker, stating that she "wishes to submit [her] resignation for flying for the reason that [she is] getting married." Mrs. Thompson added that because she enjoyed her employment with Delta she hoped to return in another capacity in the future.

5: 3B Moore, supra, ¶ 23.07.

6. 3B Moore, supra, ¶ 23.07[2], p. 23-371; Eisen v. Carlisle & Jacquelin, supra, at 562, 563.

It is obvious that her termination did not result from the maternity leave policy.

Finally, the plaintiff moves to sever liability and damages under Rule 42, Fed. R. Civ. P. Prior to the trial, the court indicated its concurrence with this motion and stated to counsel that the final hearing would encompass only the liability questions, reserving until a later date the issue of damages and other relief, if necessary. The case proceeded to trial with this understanding. The motion is belatedly and formally granted.

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(a)(1) prohibits the discharge of any employee or from discrimination with respect to the terms, conditions or privileges of employment on the basis of sex.[7] There exists, however, an exception for cases of sex discrimination in the "bona fide occupational qualification" (hereinafter referred to as the "B. F. O. Q.") test found in Section 703(e) (42 U. S. C. § 2000e-2(e)) of the Act.

In the trial, both parties offered the testimony of highly qualified physicians—obstetricians, gynecologists, hematologists and psychiatrists in support of their respective positions. These witnesses, whether called by the plaintiff or the defendant, indicated that the decision as to when a pregnant woman should cease her outside work was an individual one to be made by the physician and the patient. The considerations for such a determination include, among other things, working conditions, the type of work performed, the preference of the woman, the accessibility of a hospital, and of course, the possibility of complications to both mother and child. The experts almost entirely agreed that, in most cases, a woman could work until

7. Section 703(a)(1), 42 U. S. C. § 2000e-2(a)(1) reads as follows:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

the onset of delivery with proper diet, prenatal care and appropriate working conditions. In fact, in some cases, it was noted that the requirement that pregnant women leave their job could have detrimental effects. One of the defendant's own witnesses, when asked whether a maternity leave policy requiring the woman to leave work after five months was reasonable, commented: "Well, I am not so sure it's a reasonable policy. . . ." He listed several factors to be taken into consideration in making such a determination including those mentioned above.[8] From the evidence, there is no legal or factual foundation with which to support a policy of arbitrarily fixing a time when a pregnant woman must terminate her employment.

Similar cases interpreting Section 703 establish that employer policies based on sex will not be tolerated. *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969); *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228 (5th Cir. 1969). The defendant has assumed that its pregnant ground employees are unable to work productively beyond a certain period of time. The Supreme Court decision in *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971) "is compellingly clear on the point that Title VII of the Civil Rights Act of 1964, 42 U. S. C. A. Section 2000e-2 forbids employment opportunity discrimination on the basis of stereotyped or overly categorized distinctions between the male and female sexes." *Vick* v. *Texas Employment Comm.*, ... F. Supp. ....., No. 70H-1164 (S. D. Tex. August 30, 1973). Although pregnancy may involve the entire spectrum of personal and social sensitivities, it cannot be the basis for discrimination in view of *Phillips* and Title VII of the Act.

Moreover, there has been no showing that Delta's maternity leave policy is "reasonably necessary to the normal operation" of the airline's business. 42 U. S. C. § 2000e-2(e)(1). See 29 C.F. R. 1604.2 (1973). In *Weeks* v. *Southern Bell Telephone & Telegraph Co., supra,* the Fifth Circuit Court of Appeals

8. Transcript at 463 ff.

made it clear that the burden of proof is on the employer to demonstrate the justification of the B. F. O. Q. exception to certain jobs.

> In order to rely on the bona fide occupational exemption, an employer has the burden of proving he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.

Id. at 408 F. 2d 235. See also *Cheatwood* v. *South Central Bell Telephone & Telegraph Co.*, 303 F. Supp. 754 (M. D. Ala. 1969). In the present case the plaintiff challenges not merely a single job classification, but a policy which excludes *all pregnant women* from work after an arbitrary date. Since Delta failed to substantiate that pregnant women are not capable of efficiently working after the fifth month of pregnancy and because of the decisive nature of the enlightened medical testimony, it must be concluded that no B. F. O. Q. exception exists. In sum, Delta's five month maternity policy violates Title VII of the Civil Rights Act of 1964 and is a form of sex discrimination.

The next issue of whether the defendant violated § 703 of the Act in denying its pregnant employees disability pay, sick leave pay, or any other attendant employment benefits such as accrual of seniority and use of company insurance benefits is apparently one of first impression. There is a marked absence of criteria by which the scope of Section 703(e) of the Act may be measured. Comment, 51 N. C. L. R. 768, 781 (1973). As noted above, there are no judicial decisions comparable to this situation although various courts have considered sex discrimination in connection with some "fringe benefit" plans, *e.g.*, *Rosen* v. *Public Service Electric & Gas Co.*, 409 F. 2d 775 (3rd Cir. 1972), pension plans; *Hays* v. *Potlach Furests, Inc.*, 465 F. 2d 108 (8th Cir. 1971), overtime pay; *Bartness* v. *Drewrys*, 444 F. 2d 1186 (7th Cir. 1971), retirement plans; *Nixon* v. *Southern Bell Telephone & Telegraph Co.*, 334 F. Supp. 525 (N. D. Ga. 1971), retirement plans. Those cases

are distinguishable from the present one since they deal with disparate treatment of the sexes.

The only authority directly supporting the plaintiff's assertion that denial of sick and disability benefits to a pregnant woman is sex discrimination are those set forth in the EEOC guidelines which were first issued in 1972 at 29 C. F. R. § 1604.10, almost eight years after the enactment of the Act. The 1973 version of the guidelines at 29 C. F. R. § 1604.10(b) provides the "[d]isabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are . . . temporary disabilities and should be treated as such under any . . . insurance or sick leave plans available in connection with employment." While these agency guidelines are normally "entitled to great deference", *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 434 (1971) and cases cited therein, they are not legally binding upon the court. Similarly, EEOC reports and decisions are not adequate legal authority. *Smith* v. *Universal Services, Inc.*, ... F. 2d ....., 4 E. P. D. ¶ 7617 (5th Cir. 1972). Not only is there no judicial determination that the regulations, particularly 29 C. F. R. § 1604.10(b), mean pregnancy is a sickness or disability and therefore entitles pregnant women to such benefits as a matter of law as the plaintiff implies, there appears to be no factual basis upon which these regulations were drawn. Furthermore, upon examining the actual wording of the guidelines it is not apparent that they actually equate pregnancy with disability or sickness.

For these reasons the plaintiff's interpretation of the EEOC guidelines is not acceptable. It is more appropriate to determine this issue based upon a common sense interpretation of the facts presented at the trial. Whether the plaintiff and her class are the victims of discrimination because of sex depends on the definition of pregnancy. After careful consideration of the evidence, including the medical testimony, it must be concluded that pregnancy is neither a sickness nor a disability. In the first place, pregnancy is, in most cases, a voluntarily imposed con-

dition and the fact of its existence demonstrates that a woman is quite healthy and normal, since sick is defined as "affected with disease; not well or healthy, ill, ailing, indisposed". Webster's Third International Dictionary, Unabridged (1969) at p. 2110. A reasonable approach dictates the holding that pregnancy is not sickness in the usual sense of the word.

Finally, the defendant's maternity policy is attacked as discriminatory because it permits those on such leave to be permanently replaced although they are granted priority for future employment and retain their benefits based on length of service. Other cases dealing with Title VII sex discrimination have declared as illegal the refusal to hire mothers, *Phillips* v. *Martin Marietta Corp., supra;* or those who may become mothers, *Cheatwood* v. *South Central Bell Telephone & Telegraph Co., supra;* or to discharge pregnant employees, *Doe* v. *Osteopathic Hospital of Wichita,* 333 F. Supp. 1357 (D. Kan. 1971) and cases cited therein. It arguably appears then that a refusal to rehire in an available similar job also would be violative of the Act, unless it can be shown that such refusal was dictated by business necessity, a limited exception to the Act's command against discrimination. *Griggs* v. *Duke Power Co., supra.*

The applicability of the "business necessity" doctrine depends upon much more than just convenience. "Necessity connotes an irresistible demand." *United States* v. *Bethlehem Steel Corp.,* 446 F. 2d 652, 662 (2nd Cir. 1971). For such a policy as Delta's to be maintainable, it must promote efficiency of operation and be indispensable toward that end. See *U. S.* v. *Jacksonville Terminal Co.,* 451 F. 2d 418 (5th Cir. 1971); *U. S.* v. *Bethlehem Steel Corp., supra; Robinson* v. *P. Lorillard Corp.,* 444 F. 2d 791 (4th Cir. 1971), *cert. den.* 406 U. S. 906 (1972). In an earlier case construing the "business necessity" rule, the Fifth Circuit Court of Appeals specifically noted that "[w]hen the defendant's conduct evidences an economic purpose there is no discrimination under Title VII. . . ." *Local 189*

United Papermakers & Paperworkers v. *United States,* 416 F. 2d 980, 992 (5th Cir. 1969). See also *Jones* v. *Lee Way Motor Freight, Inc.,* 431 F. 2d 245, 249 (10th Cir. 1970).

Delta justifies its failure to rehire the plaintiff on the ground, among others, that it cannot obtain temporary replacements for pregnant employees and that holding such a large number of positions open for women on maternity leave would be demoralizing to the remainder of its work force. The plaintiff points out, however, that, according to James A. York, a Delta vice president, the airline often makes use of temporary employees especially during "peak load" or rush times (Transcript at pp. 585 ff). She further maintains that Delta's own records (Plaintiff's Exhibit 13) reveal a much smaller number of employees on maternity leave, slightly over two percent. While it appears that Delta does employ temporary help at certain times during the year, such short term assistance is not used for periods as long as normally required for those on maternity leave. The feasibility of utilizing temporary replacements in such circumstances was not supported by the evidence.

Of greater importance, however, is the evidence that the plaintiff was not rehired because of a business "slump" at the time which affected Delta and others in the air travel industry. In fact, the plaintiff's old job was later abolished as a result of this adverse economic impact. This reality is substantiated by the failure of the plaintiff to obtain employment with any other Atlanta-based airlines, even though she was experienced in a phase of that business. Therefore, the evidence is uncontradicted that Delta's failure to re-employ the plaintiff was dictated by business prudence rather than sex discrimination.

Inasmuch as this determination necessarily applies only to the plaintiff's individual claim, the rights and demands of each of the members of the class must await adjudication until a subsequent hearing for damages and other relief.

In summary, the policy of the defendant as it existed in 1970 requiring female ground employees to take maternity leave at

the end of the fifth month of pregnancy without giving consideration to the individual abilities of such employees to continue working amounts to discrimination based upon sex and is violative of Section 703 of the Civil Rights Act of 1964. The defendant's refusal to re-employ the plaintiff at the conclusion of her maternity leave was due to economic necessity and not to sex discrimination. As stated, another hearing will be scheduled as soon as practicable to consider the remaining issues of damages and injunctive relief affecting the plaintiff and other members of the class.

So ordered this the 31st day of December, 1973.

/s/ ALBERT MARTIN
Judge, United States District Court for the Northern District of Georgia

IN THE UNITED STATES DISTRICT COURT
* * (Caption—72-169) * *

MEMORANDUM ORDER

The Defendant Liberty Mutual Insurance Company has moved the court to reconsider that portion of its Order of January 9, 1974 that found that the Defendant's policy of requiring female employees to return to work within three months of delivery or be terminated and its policy of denying the benefits of the disability income protection plan to female employees for any disability related to pregnancy or childbirth are violations of Title VII of the Civil Rights Act of 1964.

Defendant brings to our attention the decision of the Northern District of Georgia in *Newman* v. *Delta Air Lines, Inc.*, Civil Action No. 15681, issued December 31, 1973 of which this court was unaware at the time of its January 9, 1974 order. We have considered that Opinion and its Findings which, in many parts, are in complete accord with the Findings of this Court. However, we do disagree with the Finding of that court that pregnancy is not a "disability".

We do note that the decision in *Newmon* v. *Delta Air Lines, Inc.* was made after a consideration of a great deal of evidentiary material presented by both parties in that case concerning working conditions, the type of work performed, the preference of the woman, the accessibility of a hospital, and, of course, the possibility of complications to both mother and child in pregnancy cases. The court also considered whether or not the defendant Airlines maternity leave policy was "reasonably necessary to the normal operation of the airlines business".

The remainder of Defendant's motion continues the argument that it is impossible for Defendant to present any statistical material of the cost of extending disability benefits to pregnancy because no statistics are available. Whether such statistics are

available or not, the Defendant made no attempt to produce any such evidence before this court. The court cannot understand why the disability from performing work due to pregnancy or childbirth cannot be medically determined in the same way that disability from performing work is medically determined in all other disability cases. For a half century or more in this country, and for over a century in European countries these matters are decided in hundreds, if not thousands, of cases daily.

Finally, the Defendant argues that "because employees can, in some situations, make as much or more money by receiving disability income it can be assumed that females on pregnancy leave of absence will remain at home longer than normal." The Defendant presented absolutely no evidence to support this argument and as a trial judge who has seen hundreds of cases of soft tissue damage arising from the so-called "whip lash" type of injuries which produce few observable objective symptoms the court sees no basis for assigning the tendency to malinger as a sex-related characteristic. If, as defendant suggests, the employee can make as much or more money on disability than at work be true, then the fault lies with the particular insurance plan and not with the female sex. The motion for reconsideration will be denied.

In its Order the court stated it would enjoin the continuance of practices which the court found to be in violation of Title VII. The Plaintiffs were invited to submit the form of the injunction order and the Defendant has filed Notice of Appeal and asked for stay of any injunctive order. Under these circumstances the court will withhold the issuance of the injunctive order and amend the Order previously issued under the provisions of Fed. R. Civ. P. 54(b), as follows:

And Now this 20th day of February, 1974 it is Directed that final judgment be Entered in favor of Plaintiffs that Defendant's policy of requiring female employees to return to work within three months of delivery of a child or be terminated is in violation of the provisions of Title VII of the Civil Rights

Act of 1964; that Defendant's policy of denying disability income protection plan benefits to female employees for disabilities related to pregnancies or childbirth are in violation of Title VII of the Civil Rights Act of 1964 and that it is expressly Directed that Judgment be Entered for the Plaintiffs upon these claims of Plaintiffs' Complaint; there being no just reason for delay.

Order Filed.

/s/ GERALD J. WEBER
Gerald J. Weber
United States District Judge

cc: HOWARD SPECTER, ESQ.
LITMAN, LITMAN, HARRIS & SPECTER
Grant Building
Pittsburgh, Pennsylvania 15219

KALVIN M. GROVE, ESQ.
LEDERER, FOX AND GROVE
111 West Washington St.
Chicago, Illinois 60602

ROBERT A. PENNEY, ESQ.
175 Berkeley Street
Boston, Mass. 02226

CLEM R. KYLE, ESQ.
1305 Clark Building
Pittsburgh, Pennsylvania 15222

MILTON A. SMITH
General Counsel
RICHARD BERMAN
Chamber of Commerce of the
United States of America
1615 H Street N. W.
Washington, D. C.

GEORGE SMETANA, ESQ.
925 South Homan Avenue
Chicago, Illinois

LAURENCE D. EHRLICH
JULIAN D. SCHREIBER
120 S. LaSalle St.
Chicago, Illinois

ROBERT F. STONE, ESQ.
3025 Mellon Bank Building
Pittsburgh, Pa. 15219

BETH L. DON, ESQ.
Equal Employment Opportunity Commission
1800 G Street, N. W.
Washington, D. C. 20506

MR. WALTER P. DEFOREST
Attorney at Law
747 Union Trust Bldg.
Pittsburgh, Pa. 15219

JAMES F. BENNETT, ESQ.
Equal Employment Opportunity Commission
2038 Federal Building
Pittsburgh, Pa. 15222

IN THE UNITED STATES DISTRICT COURT

* * (Caption—72-169) * *

NOTICE OF APPEAL FROM PART OF ORDER

Notice is hereby given that Liberty Mutual Insurance Company, defendant above named, hereby appeals to the United States Court of Appeals for the Third Circuit from so much of the amended order entered in this action on the 19th day of March, 1974 and the order entered in this action on the 9th day of January, 1974, that finds that certain policies of the defendant are violations of Title VII of the Civil Rights Act of 1964, 42 U. S. C. 2000(e) *et seq.* and that this action may proceed as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

Dated: April ___, 1974.

/s/ KALVIN M. GROVE
Kalvin M. Grove
Lederer, Fox and Grove
111 West Washington Street
Chicago, Illinois 60602

ROBERT A. PENNEY
175 Berkeley Street
Boston, Massachusetts 02226

CLEM R. KYLE
1305 Clark Building
Pittsburgh, Pennsylvania 15222

IN THE UNITED STATES COURT OF APPEALS

* * (Caption—74-1233) * *

MOTION FOR LEAVE TO PRESENT BACKGROUND STATISTICS

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

Liberty Mutual Insurance Company, appellant herein, respectfully requests leave of this Court to present background statistics pertinent to this case, as contained in the attached sworn affidavit of its Assistant Vice President and Manager of Employee Relations, Kenneth D. Spaulding, and referred to in appellant's brief at nn. 16 and 19. In support whereof, Appellant states:

1. In its opinion, the lower court took judicial notice of national statistics concerning the number of births which occur in the country (A. 132). Although the record did not contain statistics relative to Liberty's experience, it did note that "We have no doubt that a large insurance company is well aware of the precise statistics." (A. 132.)

2. Liberty respectfully wishes to present to the Court, as background material deserving whatever weight the Court would accord it, statistics relative to Liberty's experience concerning the incidence of pregnancy among its staff.

Wherefore, appellant furnishes the attached affidavit of Kenneth D. Spaulding, and requests leave to present to the Court, for background purposes, the statistics therein contained.

KALVIN M. GROVE
STEVEN R. SEMLER
LEDERER, FOX AND GROVE
Sears Tower—Suite 7916
233 South Wacker Drive
Chicago, Illinois 60606

ROBERT A. PENNEY
175 Berkeley Street
Boston, Massachusetts 02226

CLEM R. KYLE
717 Liberty Avenue
Pittsburgh, Pennsylvania 15222
Attorneys for Liberty Mutual Insurance Company

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

AFFIDAVIT OF KENNETH D. SPAULDING

Kenneth D. Spaulding, being duly sworn, deposes and says:

1. I am employed as Assistant Vice President and Manager, Employee Relations, with Liberty Mutual Insurance Company.

2. Liberty Mutual Insurance Company maintains, in the regular course of business, monthly statistics of the number of claims paid on its Income Protection Plan, and also statistics concerning the monthly incidence of pregnancy related absences, as well as the monthly incidence of employees who return to work at Liberty following pregnancy related absences. These records indicate that:

a. During the 54 month period between July 1, 1969 and December 31, 1973, the monthly incidence of paid income protection plan claims averaged 149 per month.

b. During the 31-33 month period ending July 1, 1973, which covers the period of commencement of maintenance of these statistics, up to and including those which have been computed:

(i) Of all female Liberty employees, an average of 38 per month left Liberty's employ due to pregnancy.

(ii) Over the same period, an average of seven employees per month who had left Liberty due to pregnancy, returned to Liberty's employ.

3. Liberty does not regularly maintain statistics on a "name by name" basis indicating which employees left due to pregnancy and which thereafter returned. The above figures only reflect the monthly average of those who leave due to pregnancy and the monthly average of those who, although not necessarily the same employees, return during the same period.

4. Further affiant saith not.

I swear that the foregoing is true to the best of my knowledge.

/s/ KENNETH D. SPAULDING
Kenneth D. Spaulding

Subscribed and sworn to before me this 14th day of May, 1974.

/s/ DOROTHY BESKIN
Dorothy Beskin

[NOTARY SEAL] *Notary Public*

IN THE UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 74-1233

SANDRA WETZEL and MARI ROSS, on behalf of themselves
and all others similarly situated,
Equal Opportunity Commission as Amicus Curiae,
Appellees,

vs.

LIBERTY MUTUAL INSURANCE COMPANY,
a Corporation,
Appellant.

On Appeal From The District Court,
Western District, Pennsylvania

APPELLEES' RESPONSE IN OPPOSITION TO APPELLANT'S MOTION FOR LEAVE TO PRESENT BACKGROUND STATISTICS

The appellees, by their attorneys, Litman Litman Harris & Specter, P. A., pursuant to Rule 27(a) of the Rules of Appellate Procedure, hereby respond to the appellant's Motion For Leave to Present Background Statistics as follows:

1. The issues before this Honorable Court were decided by the court below on the appellant's motion for summary judgment based, *inter alia,* upon statistical evidence which was part of the record below.

2. In an appendix to its principal brief, the appellant has filed what purports to be a motion for leave to present background statistics in the form of an affidavit. Neither the affidavit nor the statistics were part of the record below and neither was presented to the trial court.

3. The appellant's motion does not constitute an attempt to correct or modify the record as permitted by Rule 10(e) of the Rules of Appellate Procedure.

4. The appellant stated below that no reliable statistics were available to it.

WHEREFORE, appellees pray this Honorable Court to deny the appellant's Motion For Leave to Present Background Statistics.

LITMAN LITMAN HARRIS &
SPECTER, P. A.

By: /s/ HAROLD A. SPECTER
Harold A. Specter
1320 Grant Building
Pittsburgh, Pennsylvania 15219
(412) 471-3200
Attorneys for Appellees

IN THE UNITED STATES COURT OF APPEALS

* * (Caption—74-1233) * *

APPELLANT'S RESPONSE TO APPELLEES' OPPOSITION TO MOTION FOR LEAVE TO PRESENT BACKGROUND STATISTICS

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

Comes now Liberty Mutual Insurance Company, and in response to Appellees' opposition to Appellant's motion for leave to present background statistics, states as follows:

1. The statistics contained in appellant's motion for leave to present background statistics solely pertain to the incidence of pregnancy among its staff. They do not involve calculation of the *cost* of including benefits for pregnancy related disabilities within appellant's sickness and accident income protection plan.

2. In proceedings before the District Court, undersigned counsel for appellant maintained that there was no reliable basis to estimate the *cost* of providing pregnancy related disability benefits due to, *inter alia,* the enormous difficulty of accurately assessing the bona fide period of real disability. Thus, appellees' statement in opposition that ". . . appellant stated below that no reliable statistics were available to it" is deceiving because the representation referred to does *not* relate to the background pregnancy incidence statistics contained in appellant's motion.

3. The subject case was decided on summary judgment and involves issues of significant judicial first impression in the United States Courts of Appeals: whether Title VII of the Civil Rights Act of 1964 requires an employer who maintains a sickness and accident income protection plan to include within the plan's coverage benefits for employees who become pregnant. Background statistics concerning the incidence of pregnancy in appellant's staff is, it is submitted, especially appropriate to this Court's consideration of this significant issue.

WHEREFORE, appellant urges that this Court grant its motion for leave to present background statistics.

Respectfully submitted,

/s/ KALVIN M. GROVE
Kalvin M. Grove
Lederer, Fox and Grove
Sears Tower—Suite 7916
233 South Wacker Drive
Chicago, Illinois 60606
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the attached Appellant's Response to Appellees' Opposition to Motion for Leave to Present Background Statistics was served by United States Certified Mail, postage prepaid, return receipt requested, on June 3, 1974, upon each of the following:

H. Spector, Esq.
Grant Building
Pittsburgh, Pa. 15219

Beth Don, Esq.
Equal Employment Opportunity Commission
Washington, D. C. 20506

Julian Schreiber
Borovsky, Ehrlich and Kronenberg
120 S. LaSalle Street
Chicago, Illinois 60603

/s/ KALVIN M. GROVE
Kalvin M. Grove

Office of the Clerk
UNITED STATES COURT OF APPEALS
For the Third Circuit
2046 U. S. Court House
Ninth & Chestnut Streets
Philadelphia 19107

Thomas F. Quinn
Clerk

June 12, 1974

Re: Sandra Wetzel, et al. v. Liberty Mutual Insurance Co., *Appellant*
(D. C. Civil No. 72-169)
No. 74-1233

Enclosed herewith is conformed copy of order entered today in the above entitled case.

T. F. QUINN, *Clerk*

kn

cc: To all parties

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
No. 74-1233

June 3, 1974

SANDRA WETZEL and MARI ROSS, on behalf of themselves and all others similarly situated
Equal Opportunity Commission as amicus curiae

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a corporation,
Appellant

(D. C. Civil No. 72-169)

Present: STALEY, GIBBONS and WEIS, *Circuit Judges.*

1. Appellant's motion for leave to present background statistics, as contained in the attached sworn affidavit of its Assistant Vice President and Manager of Employee Relations, Kenneth D. Spaulding, and referred to in appellant's brief at nn. 16 and 19
2. Appellees' response in opposition to appellant's motion for leave to present background statistics
(Due 5-25-74, received 5-30-74, not filed unless Court directs)

in the above listed for Monday, June 10, 1974.

enc.
fm

Respectfully,
T. F. QUINN
Clerk

The foregoing Motion is granted, without binding the panel which hears the appeal on the merits as to the use to which it may put such statistics.

By the Court,
/s/ JOHN J. GIBBONS
Judge

Dated: June 12, 1974.

STATUTES

THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. *§ 2000e, et seq.*

§ 703(a) [42 U. S. C. 2000e(2)(a)]:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

---

§ 706(a) [42 U.S.C. 2000e-5a]:

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.

---

§ 706(b) [42 U. S. C. 2000e-5b]:

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In detemining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

---

§ 706(e) [42 U.S.C. § 2000e-(e)]:

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or locai agency.

---

§ 706(g) [42 U.S.C. § 2000e-5(g)]:

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to

reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination of race, color, religion, sex, or national origin or in violation of section 704(a).

E.E.O.C. Employment Guidelines

[29 C.F.R. § 1604]

Sec. 1604.9 Fringe Benefits.—(a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

(c) Where an employer conditions benefits available to employees and their spouses and families or whether the employee is the "head of the household" or "principal wage earner" in the family unit, the benefits tend to be available only to male employees and their families. Due to the fact that such conditioning discriminatorily affects the rights of women employees, and that "head of household" or "principal wage earner" status bears no relationship to job performance, benefits which are so conditioned will be found a prima facie violation of the prohibitions against sex discimination contained in the Act.

(d) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to

make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

(e) It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

(f) It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex. A statement of the General Counsel of September 13, 1968, providing for a phasing out of differentials with regard to optional retirement age for certain incumbent employees is hereby withdrawn.

Sec. 1604.10 Employment Policies Relating to Pregnancy and Childbirth.—(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

Supreme Court, U. S.
FILED
MAY 6 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY, a Corporation,

Petitioner,

vs.

SANDRA WETZEL, and MARI ROSS, on Behalf of Themselves and All Others Similarly Situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

HOWARD A. SPECTER
HARRY J. GRUENER
JANICE I. GAMBINO
LITMAN LITMAN HARRIS & SPECTER, P.A.
1320 Grant Building
Pittsburgh, Pennsylvania 15219

ROBERT F. STONE
FINE, PERLOW & STONE
1528 Frick Building
Pittsburgh, Pennsylvania 15219

Attorneys for Respondents

Financial Press Corporation, Pittsburgh

INDEX

	Page
TABLE OF CITATIONS	ii
QUESTION PRESENTED	1
COUNTERSTATEMENT OF THE CASE	2
ARGUMENT	5
I. The decision of the Court of Appeals does not conflict with decisions of other Courts of Appeals or with any applicable decision of this Court	5
II. The Court of Appeals has not decided an important question of Federal Law which has not been, but should be, decided by this Court	10
III. The Petition should not be granted to review the EEOC's interpretative guidelines	11
CONCLUSION	13

TABLE OF CITATIONS

CASES

	Page
Alexander v. Gardner-Denver Co., 415 U. S. 36 (1974)	9
Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir. 1971), *cert. denied sub nom. Drewrys Limited U.S.A., Inc. v. Bartmess*, 404 U.S. 939 (1971)	12
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)	8, 12
Communications Workers v. AT&T Co.,___ F.2d___, 10 FEP Cases 435 (2d Cir. 1975)	5, 7, 8, 11
Dessenberg v. American Metal Forming Co., ___ F. Supp. ___, No. C 72-48 T (N.D. Ohio, E.D. 1973)	6
Espinoza v. Farah Manufacturing Co., Inc., 414 U.S. 86 (1973)	11
Farkas v. South Western City School District, 506 F.2d 1400 (6th Cir. 1974), *affirming*___F. Supp.___, 8 FEP Cases 288 (S.D. Ohio 1974)	5
Geduldig v. Aiello, 417 U.S. 484 (1974)	7, 8-9, 10, 11, 12
Gilbert v. General Electric Co., 375 F. Supp. 367 (E.D. Va. 1974)	6
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	9, 11
Holthaus v. Compton & Sons, Inc., ___F.2d___, 9 EPD ¶ 10,068 (8th Cir. 1975)	5
Interstate Natural Gas Co. v. Federal Power Commission, 156 F.2d 949 (5th Cir. 1946), *affirmed*, 331 U.S. 682 (1947), *reh. denied*, 332 U.S. 785 (1947)	12

	Page
Lillo v. Plymouth Local Board of Education, ___ F. Supp.___, 8 EPD ¶ 9510 (N.D. Ohio 1973)	6
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	9
Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238 (N.D. Ga. 1973)	6
Newmon v. Delta Air Lines, Inc., 475 F.2d 768 (5th Cir. 1973)	6
Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)	10
Rosen v. Public Service Electric and Gas Co., 477 F.2d 90 (3d Cir. 1973)	12
Sale v. Waverly-Shell Rock Board of Education, ___ F. Supp. ___, 9 FEP Cases 138 (N.D. Iowa 1975), *leave to appeal denied*, ___F.2d ___ (8th Cir., January 31, 1975, Misc. No. 75-8088)	6
Schattman v. Texas Employment Commission, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973), *reh. denied*, 410 U.S. 959 (1973)	6
Scott v. Opelika City Schools, 63 F.R.D. 144 (M.D. Ala. 1974)	6
Singer v. Mahoning County Board of Mental Retardation, 379 F. Supp. 986 (N.D. Ohio 1974)	6
United States v. Lincoln Rochester Trust Co., 297 F.2d 891 (2d Cir. 1962), *cert. denied*, 369 U.S. 887 (1962)	12
Vineyard v. Hollister Elementary School District, 64 F.R.D. 580 (N.D. Cal. 1974)	6

Page

Wetzel v. Liberty Mutual Insurance Co.,
508 F.2d 239 (3d Cir. 1975) 2, 5, 6

Willingham v. Macon Telegraph Publishing Co.,
507 F.2d 1084 (5th Cir. 1975) 5, 6

OTHER AUTHORITIES

Federal Rule of Civil Procedure 54 3

Title VII of the Civil Rights Act of 1964,
as amended, 42 U.S.C. §§2000e,
et seq..... *passim*

28 U.S.C. §1292 6

29 C.F.R. §1604.10 (1973) 8, 12

U.S. Const. Amend. XIV ..... *passim*

In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,
Petitioner,

vs.

SANDRA WETZEL and MARI ROSS, on behalf of
themselves and all others similary situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Should certiorari be granted to review a finding that a contributory disability insurance program to which insurance company employees must subscribe as a condition of employment violates Title VII of the Civil Rights Act of 1964 where (1) the program provides benefits for all disabilities to which male employees may be subjected and no benefits for pregnancy-related disabilities; (2) the employer elected to offer no evidence of the reasons for its enactment of the program or of any potential adverse effects which including such benefits might have on the program or on the operation of its business; and (3) all of the employer's other pregnancy-related employment practices have been held to be violative of Title VII?

COUNTERSTATEMENT OF THE CASE

Petitioner, a national insurance underwriting company, provides a contributory disability insurance program to which its employees must subscribe as a condition of employment. Of all medically verifiable disabilities, other than those resulting from acts of war, intentionally self-inflicted injuries or accidents arising out of employment (for which workmen's compensation benefits would accrue), only pregnancy-related disabilities are excluded from coverage. The plan has always been contributory, and the employee's mandatory contribution has ranged from approximately one-third to fully one-half of the cost of coverage.

The disability insurance plan is not the only source of Petitioner's disparate treatment of female employees.[1] Petitioner's employment practices relating to pregnancy have varied somewhat since the effective date of Title VII, but have never complied with the law. Until March, 1967, pregnant employees were not permitted to work beyond the sixth month of pregnancy under any circumstances. Instead, they were discharged. In March, 1967, Petitioner modified its policy slightly so that pregnant employees were fired after the eighth, rather than the sixth, month of pregnancy. Automatic termination continued until September, 1970, when Petitioner began to impose unpaid leaves of absence as an alternative to mandatory discharge. Employees were placed on mandatory leaves of absence after the eighth month of pregnancy and had to return to work no later than

[1]The trial and appellate courts also condemned Petitioner's hiring and promotion practices. 508 F.2d 239 (3d Cir. 1975). Petitioner is seeking review of procedural aspects of that decision in a separate Petition for Writ of Certiorari at No. 74-1288. Respondents are seeking review of one aspect of that decision in a Petition for Writ of Certiorari at No. 74-1319. A separate claim of discrimination in compensation was tried and is pending before the trial court.

six months from commencement of the leave or three months from the date of delivery, whichever came first. The policy was modified in November, 1971, to enable an employee to work for as long as her physician verifies her ability to continue. The mandatory return dates, which were applied uniformly without regard to any disabling complications which may result from pregnancy or childbirth, remained in force. These discharge, leave and return date practices applied to no other disabilities.

After pursuing their administrative remedies, Respondents, two of Petitioner's female employees, commenced this Title VII class action. Their complaint challenged, *inter alia*, the practices outlined above. Following comprehensive discovery, Respondents moved for summary judgment on the issue of liability. Petitioner elected not to offer evidence of the reasons for its practices or of any financial or business consequences which might result from abandoning those practices. The trial court declared the pregnancy-related policies violative of Title VII. Although no relief, in the form of an injunction or otherwise, was granted, the trial court directed the entry of final judgment on the pregnancy-related claims pursuant to F.R.C.P. 54(b). Petitioner appealed with respect to those aspects of the pregnancy-related issues dealing with its insurance program and its policy of discharging disabled female employees who do not return to work from maternity leaves of absence by a date certain without regard to medical disabilities. The Court of Appeals for the Third Circuit affirmed. The Petitioner has abandoned its argument concerning its mandatory return date policy for disabled pregnant employees and has petitioned this Court to review only those aspects of the decision dealing with the exclusion of benefits for pregnancy-related disabilities from its otherwise all-inclusive program. Although only one practice has been offered for review by this Court, Respondents have

summarized their employer's other pregnancy-related employment practices and the rulings of the trial and appellate courts with respect to those practices because acceptance of Petitioner's argument automatically will validate those practices as well. Petitioner has contended that no disparate treatment of pregnant employees is proscribed by Title VII. If such is the case, the employer will be free not only to deny benefits for pregnancy-related disabilities, but also to reinstate its policy of firing pregnant employees without regard to the ability to work or to their records as stellar, loyal employees.

It is important to define precisely what Respondents do and do not claim. Contrary to the suggestions contained in the Petition and the *amicus* briefs, Respondents do not contend that Title VII requires all employers to provide income protection plans or disability benefits for normal pregnancy leaves or for all pregnancy-related disabilities. They do contend that in the absence of a legally valid justification for exclusion, an employer who has a disability program which provides insurance coverage and paid leaves of absence for every disability with which a male may be afflicted is precluded by Title VII from excluding only pregnancy-related disabilities and absences from that program. This case is limited also to a context in which the employer offered no justification for any of its practices and in which all of those practices were condemned by the trial and appellate courts. The belated and unrelated factual arguments now raised by Petitioner and its companion *amici* have nothing to do with this case.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS OR WITH ANY APPLICABLE DECISION OF THIS COURT.

Notwithstanding the efforts to suggest the existence of a conflict between the Court of Appeals' decision and the decisions of other District or Circuit Courts or of this Court, no conflict exists. There is virtual unanimity among the courts which have considered the present issue. In *Holthaus v. Compton & Sons, Inc.*, ___ F.2d ___, 9 EPD ¶ 10,068 (8th Cir. 1975), the Court of Appeals for the Eighth Circuit specifically relied upon the Court of Appeals' reasoning in this case and rejected Petitioner's position. Similarly, in *Communications Workers v. AT&T Co.*, ___ F.2d ___, 10 FEP Cases 435 (2d Cir. 1975), the Court of Appeals, citing *Wetzel* and other Title VII decisions, held that allegations of disparate treatment between pregnancy-related and other disabilities in a private employment context are sufficient to state a claim on which Title VII relief can be granted. Even before the decisions in *Holthaus*, *Communications Workers* and this case, the Court of Appeals for the Sixth Circuit affirmed the conclusion that disparate treatment of sick leave for absences due to pregnancy is violative of Title VII. *Farkas v. South Western City School District*, 506 F.2d 1400 (6th Cir. 1974), *affirming* ___ F. Supp. ___, 8 FEP Cases 288 (S.D. Ohio 1974).

Petitioner's reliance upon *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975), to create the illusion of a conflict is misplaced. That case, which involved a grooming code that imposed different maximum hair lengths for males and females, actually supports Respondents' position. Judge Simpson, admittedly in *dictum*, concluded that employers cannot have one policy for

men and another for women if the distinction is based on some fundamental right. Consistent with the opinions of this Court, he included within those fundamental rights "the right to have children or to marry." 507 F.2d 1084, 1091. This *dictum* in *Willingham* is consistent with the Fifth Circuit's earlier reasoning in *Schattman v. Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973), *reh. denied*, 410 U.S. 959 (1973), and *Newmon v. Delta Air Lines, Inc.*, 475 F.2d 768 (5th Cir. 1973).

Reliance upon *Sale v. Waverly-Shell Rock Board of Education*, ___ F. Supp. ___, 9 FEP Cases 138 (N.D. Iowa 1975), to suggest the possibility of conflicting decisions is even more inappropriate. Petitioner concedes that *Sale* is consistent with *Wetzel*, but asserts the certification of the case for an immediate appeal pursuant to 28 U.S.C. §1292(b) in support of the existence of a conflict. Leave to appeal was denied more than two months before this Petition was filed. ___ F.2d ___ (8th Cir., January 31, 1975, Misc. No. 75-8088).[2]

---

[2]Other District Courts have reached the conclusion urged by Respondents. *Dessenberg v. American Metal Forming Co.*, ___F. Supp. ___, No. C 72-48 T, (N.D. Ohio, E.D. 1973); *Singer v. Mahoning County Board of Mental Retardation*, 379 F. Supp. 986 (N.D. Ohio 1974); *Scott v. Opelika City Schools*, 63 F.R.D. 144 (M.D. Ala. 1974); *Lillo v. Plymouth Local Board of Education*, ___F. Supp. ___, 8 EPD ¶9510 (N.D. Ohio 1973); *Vineyard v. Hollister Elementary School District*, 64 F.R.D. 580 (N.D. Cal. 1974); *Gilbert v. General Electric Co.*, 375 F. Supp. 367 (E.D. Va. 1974) (Argued and pending before the United States Court of Appeals for the Fourth Circuit at No. 74-1557).

Even *Newmon v. Delta Air Lines, Inc.*, 374 F. Supp. 238 (N.D. Ga. 1973), relied upon by Petitioner, is consistent with the instant decision. The Court held that arbitrarily fixing a time when a pregnant woman must terminate her employment constitutes proscribed sex discrimination under Title VII. A contrary result was reached with respect to sick benefits because of the court's conclusion concerning the definition of the word *sick* within the meaning of the particular employer's benefit plan.

There is no conflict between the holding in this case and any applicable decision of this Court. Notwithstanding Petitioner's and *amici's* repeated references to footnote 20 to Mr. Justice Stewart's opinion in *Geduldig v. Aiello*, 417 U.S. 484 (1974), that decision is neither factually nor legally applicable. The Third Circuit's view of the Title VII/14th Amendment dichotomy is buttressed by the comprehensive and cogent analysis in *Communications Workers v. AT&T Co., supra*, where the Petitioner's argument was confronted and rejected squarely. The court reasoned as follows:

> Footnote 20 of the majority opinion, on which the district court below principally relied in holding that *Aiello* required dismissal of the complaint in the case at bar is in essence a refutation of the dissenting view as to the Equal Protection standards of judicial scrutiny applicable to the California legislative classification before the Court. It rejects the dissenting view that the California classification should be treated like the legislative classifications in *Reed, supra*, and *Frontiero, supra*. Stating that not "every legislative classification concerning pregnancy is a sex-based classification . . .", it goes on to say that "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, *lawmakers are constitutionally free* to include or exclude pregnancy *from the coverage of legislation such as this* on any reasonable basis . . . ." . . . Thus, footnote 20 deals with the constitutional validity of legislative classifications under the Equal Protection Clause, the standards of judicial scrutiny to be applied in making such a determination, and nothing more. Moreover, it does so in the context of the extensive record before the Court as to the operation and effects of the particular statutory insurance program it was considering and the considerations which led the California legislature to adopt it.

> Nowhere, either in the body of the majority opinion in *Aiello* or in the footnote, is there any reference to the provisions of Title VII or the EEOC guidelines designed to prohibit the disparate treatment of pregnancy disabilities in the employment context. ___ F.2d ___, ___, 10 FEP Cases 435, 439-40. (Footnotes omitted).

The court also pointed out Mr. Justice Stewart's note in the majority opinion in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), where he recognized that Title VII was inapplicable to the Fourteenth Amendment cases then before the court. Mr. Justice Stewart observed:

> Shortly thereafter, the Equal Employment Opportunity Commission promulgated guidelines providing that a mandatory leave or termination policy for pregnant women *presumptively* violates Title VII, 29 C.F.R. §1604.10, 37 Fed. Reg. 6837. While the Statutory Amendments and the Administrative Regulations are, of course, inapplicable to the cases now before us, they will affect like suits in the future. 414 U.S. 632, 639, n.8. (Emphasis added).

As the court aptly concluded in *Communications Workers*, "It can scarcely be thought that Justice Stewart in *Aiello sub silentio* invalidated the guidelines which he had said only five months before in *LaFleur* would, in the future, affect suits involving pregnancy-related employment practices." ___ F.2d ___, ___, n. 11, 10 FEP Cases 435, 440, n. 11.

Petitioner contends that the equal protection issue in *Geduldig* posed a two step analytical framework which first required a determination of whether there was discrimination on the basis of sex, and, then, if so, whether the discrimination was supported by rational reasons. Petitioner admits that the second step of that analysis can yield different results under Title VII than under the Equal Protection Clause, but suggests that all of the analysis which

precedes *Geduldig's* footnote 20 is *dictum*, and that footnote 20 was dispositive not only of the issues in *Geduldig*, but also of the issues in this case. Even footnote 20, which Respondents respectfully submit does not represent the Court's holding, does not purport to validate every insurance program which excludes pregnancy as a compensable disability. In fact, the footnote states to the contrary. It suggests, if indeed it does not mandate in a Fourteenth Amendment context, an inquiry into the background, purposes and funding of such programs to ascertain the reasons for distinctions involving pregnancy. Even if a similar inquiry were relevant in a Title VII case, Petitioner simply asserted its freedom to treat pregnant employees as it deemed fit without regard to costs, motive, business necessity or consequences. Presumably, if valid reasons existed for its position, Petitioner, who is engaged in the business of evaluating and underwriting insurance risks, would have stated those reasons. Petitioner is not free now to dredge up and rely upon the belated factual assertions made by its supporting *amici* in their briefs and their own litigation.

Title VII assures equality of employment *opportunities* by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Petitioner's pregnancy-related practices deprive only women of employment opportunities. Only women cannot resume full time employment with no loss of status following a long term disability without regard to the cause of the disability. Only disabled women must return to work or be discharged by a date certain. By providing income protection benefits to all disabled male employees until age 65, Petitioner provides the opportunity to be free from the financial ruin which

often accompanies long term disability. It is no answer to assert that the practices have adverse consequences upon and constitute disparate treatment of only a subgroup of one sex. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). Every female employee, whether or not she becomes pregnant, is subject to the potentially disastrous economic impact of Petitioner's practices.

Respondents respectfully submit that the decision of the Court of Appeals in this Title VII action does not conflict with the Fourteenth Amendment holding in *Geduldig*, and that it is in harmony with those decisions of this Court which recognize that Title VII was intended to protect and promote employment opportunities.

II. THE COURT OF APPEALS HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

Petitioner argues that this case involves an important question of federal law which has not been, but should be, settled by this Court. Admittedly, whether disparate treatment of pregnant employees can ever be violative of Title VII is an important question of federal law.[3] In light of the virtual unanimity among the decisions of District and Circuit Courts, the absence of a conflict with any applicable decision of this Court, Petitioner's refusal to justify its practices on a cost, policy, purpose or business necessity basis, and the now uncontested unlawfulness of all of Petitioner's other pregnancy-related employment practices, Respondents submit that this case does not present an appropriate vehicle for this Court to settle any questions

[3]Even under Petitioner's broad interpretation of *Geduldig v. Aiello*, *supra*, there are circumstances under which such treatment can violate Title VII. It would be inappropriate on this record to speculate about all of those circumstances.

which go beyond the narrow facts of this controversy. Assuming, *arguendo*, that matters such as cost, business necessity or intent may be defenses in certain cases, no proper procedure exists for resolving in this litigation the factual arguments now raised by Petitioner and its supporting *amici* concerning the purposes and objectives of employee disability and leave plans, the cost of providing coverage for pregnancy-related disabilities under such plans, the nature of the risks involved, allegedly reasonable bases for excluding certain coverages and the effect on the plans of including those coverages. A full record of the type which was extant in *Geduldig*, and to which the court referred in *Communications Workers*, would be required.

III. THE PETITION SHOULD NOT BE GRANTED TO REVIEW THE EEOC'S INTERPRETATIVE GUIDELINES.

In adopting a shotgun approach intended to undermine the Commission's guidelines with which their practices conflict, Petitioner and the *amici* misinterpret the decisions which deal with the guidelines and, consequently, fail to recognize the very narrow range within which such interpretations will not be afforded deference. This Court first put its imprimatur of deference upon the Commission's interpretative rules in *Griggs v. Duke Power Co.*, *supra*. Thereafter, in *Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973), it reaffirmed the principle that the guidelines are entitled to great deference except in those unusual circumstances where "application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question" or "where there are 'compelling indications that it is wrong.' " 414 U.S. 86, 94-95. Those unusual circumstances are absent here. As the Commission pointed out in its *amicus curiae* brief before the Court of Appeals, the guidelines evolved as perceptions—by the Commission and others—of what con-

stitutes employment discrimination. The Commission's failure to issue its guidelines immediately cannot abrogate rights already in force under Title VII. *Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir. 1971), *cert. denied sub nom. Drewrys Limited U.S.A., Inc. v. Bartmess*, 404 U.S. 939 (1971); *Rosen v. Public Service Electric and Gas Co.*, 477 F.2d 90 (3d Cir. 1973).

In addition, as recognized in *LaFleur*, the guidelines provide only one method of establishing a *prima facie* or presumptive showing of discrimination. Section 1604.10(a) provides that an employment policy or practice which excludes employees or applicants from employment because of pregnancy is in *prima facie* violation of Title VII. Contrary to Petitioner's contention, the Court of Appeals did not hold and Respondents do not suggest that the guidelines somehow have the force of law. On the state of this record, however, consistent with *Geduldig's* statement concerning pretexts, the guidelines at least shifted to Respondent the burden of coming forward with some evidence to show the absence of a pretext. Notwithstanding the trial court's requests, Petitioner presented no evidence. The suggestion now that the Commission is obligated to justify the evolution of an interpretation which has received judicial approval and to demonstrate its consistency with the intention of Congress is tantamount to placing the Commission on trial. Acceptance of this position will hinder rather than facilitate the litigation of legitimate Title VII grievances.[4]

[4]The principal remaining argument relied upon in support of the Petition is found in Westinghouse Electric Corporation's comprehensive treatment of the legislative history of the proposed Equal Rights Amendment to the United States Constitution. The legislative history of another provision which may or may not become law cannot be relied upon to interpret an extant, different statute. *United States v. Lincoln Rochester Trust Co.*, 297 F.2d 891 (2d Cir. 1962), *cert. denied*, 369 U.S. 887 (1962); *Interstate Natural Gas Co. v. Federal Power Commission*, 156 F.2d 949 (5th Cir. 1946), *affirmed*, 331 U.S. 682 (1947), *reh. denied*, 332 U.S. 785 (1947).

CONCLUSION

For all of the reasons stated above, Respondents respectfully submit that within the narrow factual and legal confines of this case no issue is presented which is worthy of the grant of certiorari by this Court. Thus, Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

HOWARD A. SPECTER
HARRY J. GRUENER
JANICE I. GAMBINO
LITMAN LITMAN HARRIS
& SPECTER, P.A.
1320 Grant Building
Pittsburgh, Pennsylvania 15219

ROBERT F. STONE
FINE, PERLOW & STONE
1528 Frick Building
Pittsburgh, Pennsylvania 15219

Dated: May 1, 1975

Supreme Court, U. S.
FILED
MAY 21 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL and MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONSE TO BRIEF IN OPPOSITION

KALVIN M. GROVE
STEVEN R. SEMLER
LEDERER, FOX AND GROVE
Sears Tower—Suite 7916
233 South Wacker Drive
Chicago, Illinois 60606

ROBERT A. PENNEY
175 Berkeley Street
Boston, Massachusetts 02226

CLEM R. KYLE
717 Liberty Avenue
Pittsburgh, Pennsylvania 15222
Attorneys for Liberty Mutual Insurance Company

Gunthorp-Warren Printing Company, Chicago • 346-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,

Petitioner,

vs.

SANDRA WETZEL and MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONSE TO BRIEF IN OPPOSITION

Respondents' brief in opposition[1] to writ of certiorari actually underscores, rather than detracts from, the need for this Court to review this case.

1. Respondents concede, as they must, that this case presents "an important question of federal law" (Opp. p. 10), but nonetheless urge that the record below is insufficient to enable consideration of whether Title VII of the Civil Rights Act of 1964 proscribes an employer's exclusion of coverage for pregnancy related disability from an income protection plan which covers disabilities arising from sickness and accident. Contrary to Respondents, however, the record below renders this case ideal for review; the sole issue involved is the validity

1. Herein "Opp.".

of Petitioner's disability and income protection plans as applied to pregnancy, and the record contains the entire disability and income protection plans of Petitioner, as well as extensive testimony fully explaining the operation of these programs. There is, significantly, *no* factual dispute whatsoever concerning Petitioner's disability and income protection plans, the coverage of their benefits, nor the application of those programs to pregnant employees. The issue of national importance involved in this case thus arises upon an undisputed factual record.

2. While Respondents urge that Petitioner has failed to come forward with "legally valid justification for exclusion [of coverage for pregnancy]" (Opp. p. 4), and has assertedly "refus[ed] to justify its practices on a cost . . . basis" (Opp. p. 10), it inconsistently also urges, as held by the Court of Appeals (Pet. App. p. A14), that cost would *not* be a permissible defense. In short, because the paramount issue here is whether—irrespective of cost justification—Petitioner's benefit policies as applied to pregnancy constitute proscribed sex discrimination, particularly in light of this Court's recent decision in *Geduldig* v. *Aiello,* 417 U. S. 484, 496 n. 20, (1974), which indicates that it does *not,* this case presents an ideal vehicle for review of this important question.[2]

3. Petitioner has, in order to present this Court only with the critical issue of increasing national prominence concerning the pregnancy benefits sex discrimination issue, specifically refrained from seeking review of other issues resolved against it by the Court of Appeals, e.g., the Company's previously abandoned mandatory leave policy for pregnant employees.[3]

2. Petitioner believes that *Aiello* is dispositive of the point that benefit exclusion on the basis of pregnancy is not discriminatory, whether occurring in the constitutional or statutory context. But even assuming that sex discrimination were established, the remaining legal issue, which mandates consideration by this Court, would pertain to establishment of standards for determining whether considerations such as cost could ever be asserted as a defense to the violation or, conversely, whether the violation would, in essence, be *per se.*

3. In their quest to confuse the issue, Respondents have significantly misstated the record. Thus, while they twice state that only women are subject to a mandatory point of return to work "without regard to the causes of the disability" (Opp. p. 9), it is wholly undisputed that the mandatory return rule applies *only* to pregnancy. In any event, however, the return policy is not presented to this Court for review.

4. Moreover, Respondents' wholly unexplained assertion (Opp. p. 4) that a decision favorable to Petitioner on the issues presented "automatically will validate those [other] practices as well," is a gross *non-sequitor.* Thus, for instance, while this Court found a mandatory leave policy applied to pregnancy unconstitutional in *Cleveland Board of Education* v. *La Fleur,* 414 U. S. 632 (1974), it specifically found a State's exclusion of pregnancy from coverage of disability benefits to be non-discriminatory and constitutionally permissible in *Aiello, supra.* Accordingly, while the validity of Petitioner's leave policy under Title VII is not presented herein, there is no force to Respondents' strawman contention that a decision finding the benefits exclusion lawful will necessarily control other issues not even involved in this appeal.

Yet Respondents extensively belabor those issues (Opp. pp. 2-4, 8) in an attempt to cloud the single issue presented for review to this Court.[4] Such considerations, it is submitted, are not pertinent.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, Liberty Mutual Insurance Company respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

KALVIN M. GROVE
STEVEN R. SEMLER
LEDERER, FOX AND GROVE
Sears Tower—Suite 7916
233 South Wacker Drive
Chicago, Illinois 60606

ROBERT A. PENNEY
175 Berkeley Street
Boston, Massachusetts 02226

CLEM R. KYLE
717 Liberty Avenue
Pittsburgh, Pennsylvania 15222
Attorneys for Liberty Mutual Insurance Company

Supreme Court, U. S.
FILED
JUL 31 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL and MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

KALVIN M. GROVE
LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
LEDERER, FOX AND GROVE
Sears Tower—Suite 7916
233 South Wacker Drive
Chicago, Illinois 60606

ROBERT A. PENNEY
175 Berkeley Street
Boston, Massachusetts 02226

CLEM R. KYLE
717 Liberty Avenue
Pittsburgh, Pennsylvania 15222
Attorneys for Liberty Mutual Insurance Company

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX.

PAGE

Authorities Cited i

Opinions Below 1

Jurisdiction 2

Statute Involved 2

Question Presented 2

Statement of the Case 2

Summary of Argument 5

Argument 7

I. The Exclusion of Pregnancy Benefits from Liberty's Disability Income Plan Does Not Constitute Discrimination Based on Gender Under Title VII 7

II. Respondents Failed to Show That the Exclusion of Pregnancy from Liberty's Disability Income Plan Was a Pretext Designed to Effect an Invidious Discrimination Against Females 15

III. The Exclusion of Pregnancy from Liberty's Disability Income Plan Does Not Contravene *Griggs* v. *Duke Power Co.* 21

IV. The E. E. O. C.'s Current Guidelines Do Not Merit Deference 24

Conclusion 27

Appendix A: Excerpts from Liberty Mutual Insurance Company's *Current Employee Group Benefit Handbook*. A1

AUTHORITIES CITED.

Cases.

Bond v. Virginia Polytechnic Institute, 381 F. Supp. 1023 (W. D. Va. 1974). 9

Chance v. Board of Examiners, 458 F. 2d 1167 (2d Cir., 1972) 9

Cohen v. Chesterfield County School Bd., 414 U. S. 632 (1974). 18

Davis v. Washington, 512 F. 2d 956 (D. C. Cir. 1975) .. 9

Dandridge v. Williams, 397 U. S. 471 (1970). 18

Espinoza v. Farah Manufacturing Company, 414 U. S. 86 (1973). 6, 9, 23, 25, 26

Fishgold v. Sullivan Drydock & Repair Corporation, 154 F. 2d 785, aff'd, 328 U. S. 275 (1946). 25

Fagan v. National Cash Register Co., 481 F. 2d 1115 (D. C. Cir., 1973). 9

Frontiero v. Richardson, 411 U. S. 677 (1973). 9

Geduldig v. Aiello, 417 U. S. 484 (1974). .....*passim*

Gilbert v. General Electric Co., 375 F. Supp. 367 (E. D. Va. 1973). 8, 17, 22, 24

Gilbert v. General Electric Company, ... F. 2d ....., 126 Daily Lab. Rep D-1 (June 30, 1975) (4th Cir., June 27, 1975), pets. for cert. pend., Nos. 74-1589 and 74-1590. .....7, 9, 12, 17, 26

Glidden Company v. Zdanok, 370 U. S. 530 (1962). 12

Griggs v. Duke Power Co., 401 U. S. 424 (1971). 5, 6, 21, 23, 26

Jefferson v. Hackney, 406 U. S. 535 (1972). 6, 18, 23

Johnson v. Robison, 415 U. S. 361 (1974). 19

Manning v. Rose, 507 F. 2d 889 (6th Cir. 1974). 18

Morton v. Mancari, 417 U. S. 535 (1975). 10

Newmon v. Delta Airlines, 374 F. Supp. 234 (N. D. Ga., 1973). 18, 26

Phillips v. Martin Marietta Corp., 400 U. S. 542 (1971). 9

Reed v. Reed, 404 U. S. 71 (1971). 9

Reynolds v. McNichols, 488 F. 2d 1378 (10th Cir. 1973). 24

Shelley v. Kramer, 334 U. S. 1 (1948). 9

Skidmore v. Swift & Co., 323 U. S. 134 (1944). 25

Smith v. Troyan, ... F. 2d ....., 143 Daily Lab. Rep. F-1 (July 24, 1975) (6th Cir. July 3, 1975). 18, 24

Udall v. Tallman, 380 U. S. 1 (1965). 25

United Housing Foundation v. Forman, ... U. S. ....., 95 S. Ct. 2051 (1975). 25

United States v. Chesterfield County School District, 484 F. 2d 70 (4th Cir. 1973). 10

Willingham v. Macon Tel. Publishing Co., 507 F. 2d 1084 (5th Cir., 1975). 25

Statutes.

Federal:

Administrative Procedure Act, 5 U. S. C. § 553. 26

28 U. S. C. 1254(1). 2

Equal Pay Act, 29 U. S. C. § 206(d)(1). 12, 14

Civil Rights Act of 1964, Title VII, 42 U. S. C. § 2000e *et seq.* .....*passim*

42 U. S. C. § 2000e-2(a)(1). 2

42 U. S. C. § 2000e-2(h). 14

42 U. S. C. § 2000e-3. 13

State:

California Fair Employment Practices Act, Calif. Lab. Code, Part 4.5 § 1432. 24

Cal. Unemp. Ins. Code § 2601 *et seq.* 3

Hawaii Temporary Disability Ins. Law, 4 Hawaii Rev. Stat., Title 21, Chapter 392. 3

New Jersey Temporary Disability Benefits Law, N. J. Stat. Ann. § 42:21-25. 3

New York Workmen's Compensation Law, Art. IX, § 200-242. 3

Rhode Island Temporary Disability Insurance Act, General Laws, R. I., § 28-39-1. 3

Regulations and Interpretations.

Executive Order 11246, 3 C. F. R. 339. 13

29 C. F. R. § 800-116(d). 13, 14

29 C. F. R. § 1604.9. 24

29 C. F. R. § 1604.10. .....5, 24

29 C. F. R. § 860.120. 24

41 C. F. R. § 60-20.3(c). 13, 14

E. E. O. C. Dec. No. 70-360 (Dec. 16, 1969). 14

E. E. O. C. General Counsel, Opinion Letters of Oct. 12, 1965 (G. C. 158-65). 13

Jan. 28, 1966 (G. C. 588-65). 13

Nov. 15, 1966. 14

Dec. 21, 1966. 14

Illinois Fair Employment Practices Commission, Sex Discrimination Guidelines, Section XI. 24

U. S. Civil Serv. Comm'n, Bureau of Retirement Insurance and Occupational Health:

National Assoc. of Letter Carriers Health Benefit Plan (Form 41-51, Jan. 1973). 15

American Fed'n of Gov't Employees Health Benefit Plan (Form 41-26, Jan. 1973). 15

U. S. E. E. O. C. Manual:

Memorandum: "Advanced Sick Leave" (Dec. 20, 1972, and Jan. 20, 1973). 15

§ 911 (v) (Nov. 15, 1968, and July 25, 1969). 15

Wage and Hour Administrator's Opinion Letters:

No. 406 (Nov. 24, 1965). 13

No. 1117 (Aug. 25, 1970). 13

John L. Wilks, Director, O. F. C. C., Memorandum to Heads of Agencies: "Questions and Answers Concerning Sex Discrimination Guidelines" (Nov. 12, 1970). 14

Legislative History.

110 Cong. Rec. 2804-05 (1964). 11

2580 (1964). 11

2582 (1964). 11

13663-4 (1964). 11

117 Cong. Rec. H. 9368 (daily ed., Oct. 12, 1971). 12

30 Fed. Reg. 14928 (Dec. 2, 1965). 13

38 Fed. Reg. 35336 (Dec. 27, 1973). 13

Hearings Before Subcommittee 4 of The House Comm. on the Judiciary, 92nd Cong., 1st Sess. 1971). 12

H. R. Rep. No. 92-238, 92nd Cong., 1st Sess. (1971). .. 10

H. R. Rep. No. 92-359, 92nd Cong., 1st Sess. (1971). .. 12

Joint Economic Committee of Congress on the "Economic Problems of Women," 93rd Cong., 1st Sess., Report of Proceedings, Vol. 3 (1973). 22

Leg. History of the Equal Employment Opportunity Act of 1972 (H. R. 1746, P. L. 92-261), Amending Title VII of the Civil Rights Act of 1964 (Gov't. Printing Office, Nov. 1972). 14

S. Rep. No. 92-415, 92nd Cong., 1st Sess. (1971). 10

S. Rep. No. 92-689, 92nd Cong., 1st Sess. (1972). 12

Miscellaneous.

Brief of American Telephone and Telegraph Company, as *amicus curiae, Wetzel* v. *Liberty Mutual Ins. Co.*, 511 F. 2d 199 (3rd Cir., 1975). 17-18, 19, 22

Brief of Appellant, *Geduldig* v. *Aiello*, 417 U. S. 484 (1974). 17, 19, 22

Brief of the Equal Employment Opportunity Commission as *amicus curiae, Geduldig* v. *Aiello*, 417 U. S. 484 (1974). 10

Brief of the E. E. O. C. as *amicus curiae, Wetzel* v. *Liberty Mutual Insurance Co.*, 511 F. 2d 199 (1975). 11, 24

Comment, *Current Trends in Pregnancy Benefits—1972 E. E. O. C. Guidelines Interpreted*, 24 DePaul L. Rev. 127 (1974). 26

Comment, *Developments—Title VII*, 84 Harv. L. Rev. 1109 (1971). 24

Comment, *Geduldig* v. *Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 Col. L. Rev. 441 (1975). 7, 17, 19

Dept. of Defense, Director of Manpower and Reserve Affairs, *Selected Manpower Statistics* (1975). 19

E. E. O. C., *First Annual Report*, H. R. Doc. No. 86, 90th Cong. 1st Sess. (1966). 13

Koontz, *Childbirth and Child Rearing Leaves: Job Related Benefits*, 17 N. Y. L. F. 480 (1972). 18

National Clearinghouse for Alcohol Information, *Second Report to Congress* (1974). 20

National Clearinghouse for Mental Health Information, (1973). 20

Reply Brief of Appellant, *Geduldig* v. *Aiello*, 417 U. S. 484 (1974). 17

Snyder, *Alcohol and the Jews* (Yale Center for Alcohol Studies, 1958). 20

U. S. Bureau of the Census, *Statistical Abstract of the U. S.: 1974* (95th ed. 1974). 20

U. S. Dept. of Labor, Bureau of Labor Statistics, *Digest of 100 Sel. Health Insurance Plans Under Collective Bargaining Early 1966*, Bull. No. 1502 (1966). 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL and MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Pet. App.* pp. A2-A18) is reported at 511 F. 2d 199 (1975). The opinion of the District Court for the Western District of Pennsylvania (Pet. App. pp. A19-A48) is reported at 372 F. Supp. 1146 (1974) and its memorandum order (Pet. App. pp. A49-A51), denying the motion for reconsideration filed by Petitioner Liberty Mutual Insurance Company (hereafter "Liberty" or the "Company"), is reported at 372 F. Supp. 1163 (1974).

---

* The joint appendix is herein referred to as "App." The appendix to the petition for a writ of certiorari, containing the opinions of the lower courts, is referred to as "Pet. App."

JURISDICTION

The judgment of the Court of Appeals (Pet. App. p. A1), affirming the judgment of the District Court, was entered on February 11, 1975. A timely petition for writ of certiorari was thereafter filed on April 2, 1975, and granted on May 27, 1975. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTE INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e-2(a)(1) (hereafter "the Act"), in pertinent part provides:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . .

QUESTION PRESENTED

Whether a disability income protection plan which excludes disabilities due to pregnancy in addition to other disabilities, while providing for equal risk coverage, benefits and contributions on behalf of all employees, constitutes prohibited sex discrimination under the Act.

STATEMENT OF THE CASE

Liberty is a casualty insurance company which maintains offices throughout the country. The Company provides for its employees[1] a contributory[2] group disability income protection

1. A description of the plan's present provisions, as set forth in the current employee group benefit plans handbook, has been attached hereto as Appendix A. Prior descriptions of the plan are contained at App. pp. 90-100.

2. Each employee pays thirty-three (33) cents for each one hundred dollars ($100) of salary, or approximately one-third of one percent of his or her income. This employee contribution is approximately "one-third of the cost" of the policy; the Company "pays the balance." App. p. 99; and Appendix A p. A4.

plan. The plan provides benefits to an employee[3] who is absent from work for eight calendar days due to a covered illness or accident which requires the treatment of a physician. The benefits consist of two-thirds of the employee's salary to a maximum of $150.00 per week for 103 weeks if the employee has less than five years service, or to a maximum of $270.00 per week for a period up to age 65 for an employee with over five years service.[4]

There are significant limitations, however, on payment of the benefits: the various definitional restrictions as to who is an employee, the initial waiting period and the maximum amount and period of payment as indicated above; the requirement that during the first year of disability the employee must be unable to perform all of the duties of his or her occupation, and thereafter be unable to perform the duties of any occupation; the provision that any other remuneration or other statutory or plan benefit that may be received by the employee reduces the benefit provided under the Liberty plan; the modification of the plan in those States with statutory disability benefit laws[5] to meet

3. To qualify, an employee must be a full time employee who has continuously worked for Liberty for at least three months. App. pp. 89 and 98; and Appendix A p. A3.

4. The Company also provides a supplementary salary benefit plan which, in covered cases, pays one-half the difference between the employee's full salary and plan benefits for a number of weeks equal to the number of years the employee has worked for the Company. Appendix A pp. A3-A4.

5. California (Cal. Unemp. Ins. Code § 2601, *et seq.*); Hawaii (Hawaii Temporary Disability Insurance Law, 4 Hawaii Rev. Stat., Title 21, Chapter 392); New Jersey (Temporary Disability Benefits Law, N. J. Stat. Ann. § 42:21-25); Rhode Island (Rhode Island Temporary Disability Insurance Act, General Laws R. I., § 28-39-1); and New York (Workmen's Compensation Law, Art. IX, §§ 200-242). In these states, coverage commences on the first day of employment at the statutory benefit level. After the employee becomes eligible for the Liberty plan (see n. 3, *supra*), the plan picks up the difference between statutory and plan coverage. Appendix A p. A4; App. p. 100.

statutory requirements; the limitation that the disability must be the result of "accidental bodily injury or sickness" which excludes a variety of disabilities such as elective surgery like a hair transplant; and the plan's specified exclusions. The exclusions deny benefits for any period of disability caused by any act of declared or undeclared war, attempted suicide or intentionally self-inflicted injury, any disability which "does not require through its continuance the regular attendance" of a licensed physician, and "any portion of a period of disability due to mental or emotional disorder, alcoholism, or drug addiction unless the employee is engaged in a corrective program under the guidance of a licensed physician." In addition, the plan also provides that benefits are not payable "for disability due to pregnancy or any cause related to pregnancy." See Appendix A p. 3, and App. pp. 88, 99.

In 1972, at a time when the Equal Employment Opportunity Commission's (hereafter "E. E. O. C.") then-applicable guidelines permitted the exclusion of pregnancy related disabilities from an employee disability benefit plan (see nn. 20, 21, *infra*), Wetzel and Ross, two Liberty technical claims department employees in Pittsburgh, Pennsylvania, filed charges with the Commission accusing the Company of engaging in sex discrimination proscribed by the Act. Upon subsequent issuance of a right to sue letter, they commenced an action in the District Court, alleging, insofar as is relevant here,[6] that Liberty discriminated against all of its female employees by excluding the risk of pregnancy from the coverage of the income protection plan. On January 9, 1974, that Court granted Wetzel and Ross' motion for partial summary judgment on the issue of liability and issued

6. The litigation below involved a number of liability issues not now before this Court. Some have already been separately resolved, while others are still pending before the District Court. With the exception of a return from leave policy not at issue in this case, and the policy here in question, the District Court expressly found that all other matters in contention had been discontinued for some time so that no injunctive relief was necessary. Pet. App. pp. A44, A47-A48.

an interlocutory order finding, *inter alia*, that Liberty violated the Act by excluding pregnancy from benefit coverage. The District Court thereafter denied Liberty's motion for reconsideration, but did certify its findings as a final order enabling Liberty to appeal to the Third Circuit. Pet. App. pp. A50-51.

On February 11, 1975, the Third Circuit affirmed. It held, first, that this Court's decision in *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), was "not dispositive" because that case involved an Equal Protection Clause claim rather than an action arising under the Act; *second*, that the E. E. O. C.'s current guideline (29 C. F. R. § 1604.10), which states that pregnancy benefits should be applied on the same basis as "other temporary disabilities", were entitled to "deference"; *third*, that because Liberty's plan "covers so many disabilities but excludes pregnancy . . . [it] cannot stand"; and, *finally*, that although the plan "is neutral on its face . . . [it] treats a protected class in a disparate manner . . . [contrary to] *Griggs* v. *Duke Power Co.*, 401 U. S. 424." Pet. App. p. A14. Because it believes that these conclusions are without merit, Liberty has filed the instant petition.

SUMMARY OF ARGUMENT

I. This Court recognized in *Aiello* that the exclusion of "one physical condition—pregnancy—from the list of compensable disabilities" covered by a disability insurance policy "does not exclude anyone from benefit eligibility because of gender." 417 U. S. at 496-497, n. 20. Every physical condition involves a subgroup of employees that consists of varying percentages of employees of either sex. Absent, therefore, a showing of a pretext "designed to effect an invidious discrimination against the members of one sex or another" (*ibid.*), the exclusion of a particular risk is not discriminatory. An examination of the legislative history of Title VII, other related Congressional statements and the relevant background of administrative regulation further substantiates the non-discriminatory nature of a

pregnancy exclusion in a policy which provides, as here, for equivalent risk coverage, benefits and contributions for all employees.

II. Respondents did not show that Liberty's pregnancy exclusion was a pretext designed to effect an invidious discrimination against females. Rather, the exclusion is based on considerable legitimate criteria. The cost of providing pregnancy benefits is disproportionately immense and, as a result, the exclusion of pregnancy, as well as other high cost risks, from a disability income plan is commonplace. There are also significant dissimilarities in the nature, severity, duration and frequency of non-return to work of pregnancy when contrasted with other illnesses or injuries. Other plan exclusions, moreover, are also concentrated in particular sex, race and religious groups. These distinctions negate any assertion that the plan's pregnancy exclusion was motivated by a pretextual discriminatory intent.

III. Here, in contrast to *Griggs,* there are neither barriers to employment opportunity nor treatment of a protected class in a disparate manner. Female Liberty employees do not receive less benefits or aggregate risk coverage under the income protection plan than do their male counterparts. In fact, under plans such as Liberty's, females receive a disproportionately high percentage of benefits in addition to protection against many uniquely feminine conditions. *Griggs,* accordingly, is inapposite; that decision does not proscribe an employment policy "simply because of variances in the [sexual] composition of the different . . . programs." *Jefferson* v. *Hackney,* 406 U. S. 535, 549, n. 19 (1972).

IV. The Court of Appeals erred in giving deference to the EEOC's present guidelines. These guidelines do not represent a contemporaneous administrative interpretation that is consistent with the congressional intent. To the contrary, the current guidelines, completely reversing the EEOC's prior well-established position, were adopted without either thorough consideration or any factual basis. Here, as in *Espinoza* v. *Farah Manufacturing Company,* 414 U. S. 86, 94-95 (1973), deference is not required because ". . . there are 'compelling indications [that the guidelines are] . . . wrong.' "

ARGUMENT

I. The Exclusion of Pregnancy Benefits from Liberty's Disability Income Plan Does Not Constitute Discrimination Based on Gender under Title VII.

The threshold question in evaluating any claim of unlawful sex discrimination, whether it be under the equal protection clause or under the Act, is to ascertain whether there is unlawful discrimination based upon gender as such.[7] In this case, as in *Aiello,* that inquiry leads inexorably to the conclusion that the exclusion of pregnancy from the totality of risks insured is not, in and of itself, as shown in Part A below, an improper sex-based classification. Moreover, it would be anomalous, as discussed in Part B below, to adopt a different test of discrimination under the Act than that utilized under the equal protection clause in *Aiello.* Finally, as shown in Part C below, an analysis of the relevant statements of congressional intent, as well as the background of administrative practices, further demonstrates that the neutral implementation of an insurance plan which is

7. In the words of Judge Widener of the Court of Appeals for the Fourth Circuit:

> The inquiry in this case must therefore focus initially on whether the exclusion of pregnancy related disability from the disability benefits plan is sex discrimination. If it is not sex discrimination, then, regardless of what test is applied there is no Title VII violation. . . . Absent a showing of sex discrimination, Title VII, even if its reach were broader than the equal protection clause would not render unlawful a pregnancy exclusion such as that involved here.

Gilbert v. *General Electric Company,* ..... F. 2d ....., 126 Daily Lab. Rep. D-1, D-4 (June 30, 1975) (4th Cir. June 27, 1975), *pets. for cert. pend.,* Nos. 74-1589 and 74-1590 (dissenting opinion). See also Comment, *Geduldig* v. *Aiello: Pregnancy Classifications and the Definition of Sex Discrimination,* 75 Col. L. Rev. 441, 466-468 (1975).

based on equal aggregate risk coverage and equal contributions for all employees does not constitute sex discrimination within the meaning of Title VII.

A. Here, as in *Aiello,* the Liberty plan does not differentiate on the basis of sex ". . . in terms of the aggregate risk protection. . . ." There is, as this Court stated (417 U. S. at 496-497):

> . . . no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.

Each employee, whether he or she is a pregnant female or a non-pregnant person, benefits equally, *i.e.,* is protected from the same risks. A reallocation of the insurance dollars available to include coverage for pregnancy disabilities would thus not only reduce the protection for males, but would reduce it for *all females,* perhaps to an inadequate level. By the same token the costs paid by all employees and for all employees by the Company is the same, in terms of the percentage of the employee's salary, without regard to gender. Accordingly, no basis exists for any claim that there is a lack of equality in treatment; the challenge is, as it was in *Aiello,* to the "underinclusiveness of the set of risks" for which protection is offered. 417 U. S. at 494. That is, however, not a request for equality which is all that Title VII guarantees, but instead a request to recognize, as one court stated in striking down a pregnancy exclusion, "women's biologically more burdensome place in the scheme of human existence."[8] Such reform is a political and social question for the legislature rather than for the courts under the Act.

The Court of Appeals found *Aiello* "not dispositive" because that case arose in a constitutional, rather than a statutory, context. Pet. App. p. A8. This difference, however, even assuming that Title VII has a reach "broader than the equal protection

8. *Gilbert* v. *General Electric Co.,* 375 F. Supp. 367, 383 (E. D. Va. 1974), *aff'd,* ..... F. 2d ....., 143 Daily Lab. Rep. F-1 (July 24, 1975) (4th Cir. June 27, 1975), *pets. for cert. pend.,* Nos. 74-1589 and 74-1590.

clause, would not render unlawful a pregnancy exclusion such as that involved here. Since the Supreme Court has held, for precisely the same exclusion, there is a 'lack of identity between the excluded disability and gender as such', the exclusion should no more support a finding of discrimination under Title VII than under the equal protection clause." *Gilbert* v. *General Electric Co., supra* (dissenting opinion). Here, in contrast to *Phillips* v. *Martin Marietta Corp.,* 400 U. S. 542, 544 (1971), and other cases,[9] this Court is not confronted with an exclusion of employment opportunities for "persons of like qualifications" or "one hiring policy for women and another for men. . . ."[10] Rather, as *Aiello* teaches, since the Liberty plan provides equal benefits for all non-pregnant persons, whether male or female, it does not present any disparate treatment of similarly-situated persons or other form of sex discrimination.

B. It would, moreover, be "anomalous at best" for there to be dual definitions of discrimination—one for equal protection purposes and another for purposes of the Act. *Chance* v. *Board of Examiners,* 458 F. 2d 1167, 1176 (2nd Cir. 1972). Historically, it was only the conduct of the state that was circumscribed while a private employer had far broader leeway. The classical approach for a plaintiff was to demonstrate that there was state action in order to invoke the higher standard of conduct required by the equal protection clause. See, *e.g., Shelley* v. *Kramer,* 334 U. S. 1, 13 (1948). After the passage of the Act in 1964, the courts[11] interchangeably applied cases

9. See, *e.g., Reed* v. *Reed,* 404 U. S. 71 (1971); and *Frontiero* v. *Richardson,* 411 U. S. 677 (1973).

10. See *Espinoza* v. *Farah Manufacturing Co.,* 414 U. S. at 93, n. 6 (1973); cf. *Bond* v. *Virginia Polytechnic Institute,* 381 F. Supp. 1023, 1024-1025 (W. D. Va. 1974) (upholding the "underinclusiveness" of a student health plan's exclusion of coverage for gynecological examinations and pap tests); and *Fagan* v. *National Cash Register Co.,* 481 F.2d 1115 (D. C. Cir. 1973) (upholding an employer's requirement with respect to male employees' hair grooming).

11. See, *e.g., Davis* v. *Washington,* 512 F. 2d 956, 957-58 (D. C. Cir. 1975) ("The many decisions disposing of employment

involving Title VII and the equal protection clause, assuming that ". . . the test of validity under Title VII is not different from the test of validity under the fourteenth amendment."[12] And when in 1972 Congress extended the Act to cover public employment, "[t]here certainly was no indication that the substantive proscription against discrimination was intended to be any broader than that which previously existed" (*Morton* v. *Mancari*, 417 U. S. 535, 549 (1975)); the intent, instead, was to "provide" employees in the public sector with the same ". . . assistance of [an] agency of the Federal Government in redressing their grievances . . ."[13] The E. E. O. C. implicitly acknowledged this similarity of approach when, in its brief *amicus curiae* before the District Court in *Aiello*,[14] it noted that "the standards this Court should apply in determining the constitutionality of § 2626 of the California Unemployment Insurance Code are similar to the standards which would be applied to the same policy if it were challenged under Title VII. . . ."

The illogical consequences of a definitional dichotomy also suggest the need for a common definition of discrimination. If, for example, the decision below is affirmed, the State of California, while free to exclude pregnancy when acting as an

discrimination claims on constitutional grounds have made no distinction between the constitutional standard and the statutory standard under Title VII") and cases cited therein; and *United States* v. *Chesterfield County School District*, 484 F.2d 70, 73 (4th Cir. 1973) and cases cited therein.

12. *United States* v. *Chesterfield County School District*, 484 F.2d at 73.

13. See S. Rep. No. 92-415, 92nd Cong. 1st Sess. (Oct. 28, 1971), pp. 10-11, 12-13; and H. Rep. No. 92-238, 92nd Cong. 1st Sess. (June 2, 1971), pp. 18-19, 22.

14. See also the EEOC's brief *amicus curiae* to this Court in *Aiello* (p. 2):

> The decision in this case will influence decisions in the cases under Title VII since, although the standards for determining unlawful discrimination are not precisely the same under Title VII and the Fourteenth Amendment, they are in many ways analogous.

insurer of employees in the State, would nevertheless be required to include pregnancy in the disability coverage of its own employees. Similarly, private employers in the State, who, with state certification in lieu of direct participation in the state plan, provide or purchase their own coverage broader than that offered by the State, would also presumably be able to do so only if pregnancy coverage was included. Conversely, if it is assumed that state approval would throw a protective cloak over such a private employer, the result would be equally anomalous. Private employers in certain states could exclude pregnancy from their covered risks, while in otherwise identical circumstances private employers elsewhere could not. There is, in short, neither a logical nor a historical reason for differentiating the instant case from *Aiello* on the basis of that case's constitutional context.

C. Relevant legislative history and administrative experience are further reason to find *Aiello* dispositive of this case. As the E. E. O. C. has conceded,[15] the Act's 1964 legislative history does not disclose a congressional intent to prohibit a pregnancy exclusion. The legislative history of the recently proposed Equal Rights Amendment to the Constitution also provides no support for the decision below; the resolution adopted by Congress recognized that "[e]quality does not mean sameness" and that the Amendment was not intended to "prohibit reasonable classifications based on characteristics that are unique to one sex . . . [as, *e.g.*,] a law providing for payment

15. Brief of the Commission to the Court of Appeals, p. 26, n. 17. The Court of Appeals similarly acknowledged that the ". . . legislative history pertaining to the addition of the word 'sex' to the Act is indeed meager. It appears that the amendment to the Act was offered in a tongue-in-cheek manner with the intent to undermine the entire Act and assist in its defeat. See 110 Cong. Rec. 2804-05 (1964)." Pet. App. p. A9. To the extent there is helpful legislative history, it reflects a desire to permit the practice of different benefits in "industrial plans" to continue. See 110 Cong. Rec. 13663-4 (remarks of Sen. Humphrey); 110 Cong. Rec. 2580 (remarks of Congresswoman St. George); and 110 Cong. Rec. 2582 (remarks of Congresswoman Kelly) (1964).

of the medical costs of child bearing [which] could only apply to women." S. Rep. No. 92-689, p. 12.[16] This expression of congressional intent, particularly in view of the absence of any illuminating history under Title VII, "is entitled to weight." *Glidden Company* v. *Zdanok,* 370 U. S. 530, 541 (1962).

The Court of Appeals noted that in 1972, when the Act was amended, "Congress had the chance to make any changes to the Act that it felt was necessary. No substantive changes were made regarding sex discrimination, and we feel this indicates a congressional satisfaction with the operation and administration of the Act." Pet. App. p. A9. The absence of any substantive change, however, militates against, rather than in favor of, the Court's interpretation of the Act. From the early 1960's through the 1972 amendments, multiple federal administrative agencies with the responsibility of preventing sex discrimination in employment uniformly approved the type of insurance plan here at issue. For example, under the Equal Pay Act (29 U. S. C. § 206(d)(1)), a law with a similar purpose as the sex discrimination provisions of the Act,[17] the standard of legality was, and continues to be, whether "employer contributions . . . are equal for both men and women"; in such a case, "no wage differential prohibited by the equal pay provisions will result from such payments even though the benefits which accrue to the employees in question are greater for one sex than for the

16. See also, to the same effect, the separate views of various Congressmen on H. J. Res. 208 (H. R. Rep. No. 92-359, 92nd Cong., 1st Sess. p. 7 (1971)), which were characterized by the majority report of the Senate Judiciary Committee as stating "concisely and accurately the understanding of the proponents of the Amendment. . . ." (S. Rep. No. 92-689, 92nd Cong., 1st Sess., p. 12 (1972); and the testimony of various proponents, including Congresswoman Griffiths (Hearings Before Subcommittee 4 of the House Comm. on the Judiciary 92nd Cong., 1st Sess. pp. 40, 51 (1971)), Congresswoman Abzug (*id.* at p. 116) and Congressman Ryan (117 Cong. Rec. H. 9368 (daily ed. Oct. 12, 1971)), all similarly indicating that the Amendment would not preclude laws dealing with a physical characteristic unique to one sex.

17. *Gilbert* v. *General Electric Company,* 126 Daily Lab. Rep. at D-4, n. 23.

other."[18] This same "equal contributions" test was and is followed by the Office of Federal Contract Compliance (hereafter "O. F. C. C.") under its authority to regulate sex discrimination on the part of federal contractors.[19] Even the E. E. O. C.'s contemporaneous construction of Title VII incorporated by reference the interpretations and opinions of the Wage and Hour Administrator,[20] and expressly permitted an "equal contributions" exclusion of pregnancy.[21] This harmonious approach did

18. Department of Labor Interpretative Bulletin, 29 C. F. R. § 800.116(d). See also the Wage and Hour Administrator's Opinion Letters No. 406 (Nov. 24, 1965), published at 2 CCH. Lab. L. Rep., Wages and Hours ¶ 30,996.34; and No. 1117 (Aug. 25, 1970), published at *id.* at ¶ 30,681.

19. See Executive Order 11246 (3 C. F. R. 339), as amended, and 42 U. S. C. § 2000e-3 for sources of the O. F. C. C.'s authority. 41 C. F. R. § 60-20.3(c) sets forth the pertinent regulation. Notwithstanding the new guidelines of the E. E. O. C. issued after the 1972 amendments to the Act (see pp. 24-26, *infra*), the O. F. C. C., with the same responsibility as the E. E. O. C., albeit over fewer employers, has continued to adhere to the Equal Pay Act standard. Proposed changes parallel to the new E. E. O. C. guidelines (see 38 Fed. Reg. 35336 (Dec. 27, 1973)) have *not* been adopted.

20. See 30 Fed. Reg. 14928 (December 2, 1965, § 1604.7(a) and (b)).

21. The E. E. O. C. in its *First Annual Report* (H. R. Doc. No. 86, 90th Cong., 1st Sess. (1966)) pp. 41-42, stated that an employer did not violate Title VII:

> . . . by contributing to or negotiating accident insurance programs which provide different benefits for male and female employees based upon reasonable actuarial considerations, as long as the cost to the employer is the same for both groups of employees. Similarly, no violation occurs when male and female employees receive the same benefits, but the employer's contribution to the plan differs according to the sex of the employee.

See also E. E. O. C. General Counsel, Opinion Letter G. C. 158-65 (October 12, 1965), and G. C. 588-65 (January 28, 1966), cited in *E. E. O. C. First Annual Digest of Legal Interpretations* (1966), at pp. 22-23. With express reference to maternity benefits the E. E. O. C. consistently informed employers that they were not required to provide the same fringe benefits for pregnancy as they provided for illness or injury. Thus, in the *First Annual Report,* it was stated (pp. 40-41):

> The prohibition against sex discrimination is especially difficult to apply with respect to the female employee who becomes preg-

not result from happenstance. It was part of a design ". . . to assure that there [was] . . . uniformity of approach among Federal programs for equal opportunity"[22] as mandated by Section 703(h) of the Act (42 U. S. C. § 2000e-2(h)) which requires consistent application of the Equal Pay Act and Title VII. Indeed, when the 1972 amendments of the Act were enacted, the O. F. C. C.'s "equal contributions" standard was cited as evidence of the meritorious quality of its performance,[23] as was the Department of Labor's enforcement of the Equal Pay Act.[24]

nant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. The pregnant female, however, has no analogous male counterpart and pregnancy necessarily must be treated uniquely.

See to the same effect: E. E. O. C. General Counsel Opinion Letters of November 15, 1966 (B. N. A. F. E. P. Rep. at 401:3032) and December 21, 1966 (C. C. H. Emp. Prac. Guide ¶ 17,304.43); and E. E. O. C. Dec. No. 70-360 of December 16, 1969 (C. C. H. Emp. Prac. Guide ¶ 6084).

22. Memorandum from John L. Wilks, Director of the O. F. C. C., dated November 12, 1970, to Heads of Agencies, prepared "[t]o assist Contract Compliance Officers in interpreting the Sex Discrimination Guidelines . . .", at p. 3:

> Q. What is a contractor's obligation with respect to fringe benefits?
>
> A. The contractor must provide equal money contributions or equal benefits for insurance, pensions, welfare programs and other similar fringe benefits received by men and women. This rule is consistent with the long established interpretation of the Equal Pay Act which the Department of Labor also administers. The Equal Pay Act is a 1963 Amendment to the Fair Labor Standards Act, requiring equal pay for women. See 29 C. F. R., Section 800-116(d). OFCC's interpretations are designed to assure that there will be a uniformity of approach among Federal programs for equal opportunity. See 41 CFR, Section 60-20.3(c).

23. See, *e.g.*, Leg. History of the Equal Employment Opportunity Act of 1972 (H. R. 1746, P. L. 92-261), Amending Title VII of the Civil Rights Act of 1964 (Gov't Printing Off., November 1972) (hereafter "Leg. History of 1972"), pp. 915-943, summarizing the achievements of the O. F. C. C. including its sex discrimination guidelines (p. 940) and affirmative action programs dealing with the problem of sex discrimination, and ultimately rejecting attempts to remove the O. F. C. C.'s jurisdiction over equal employment cases.

24. Leg. History of 1972, p. 1076.

At that time, in addition, various Federal agencies differentiated pregnancy under collective bargaining agreement health insurance policies notwithstanding that Executive Orders prohibiting sex discrimination had long been in effect.[25] The 1972 amendments, in sum, provide "no reason to presume that Congress affirmatively intended to erase [the "equal contributions" test for pregnancy] . . . that previously had co-existed with the broad discrimination provisions in the Executive Orders." *Morton* v. *Mancari*, 417 U. S. at 549.

As in *Aiello*, an insurance policy based, as here, on equal contributions and providing equal coverage for all persons is, on its face, non-discriminatory. To conclude otherwise under Title VII requires a clear expression of congressional intent. There is, however, as demonstrated above, no such expression of congressional intent in this case.

II. Respondents Failed to Show That the Exclusion of Pregnancy from Liberty's Disability Income Plan Was a Pretext Designed to Effect an Invidious Discrimination Against Females.

In this case, as in *Aiello*, there has been no showing that the exclusion of pregnancy from the disability income plan's list of compensable disabilities was not founded upon ". . . an objective and wholly noninvidious basis." 417 U. S. at 496. In contrast to potentially discriminatory situations,[26] the Respondents

25. See, *e.g.*, 1973 Nat'l Association of Letter Carriers Health Benefit Plan (U. S. Civ. Serv. Comm'n, Bureau of Retirement, Insurance and Occupational Health, Form 41-51, Jan. 1973) at pp. 3, 10; and the 1973 American Fed'n of Gov't Employees Health Benefit Plan (U. S. Civil Serv. Comm'n, Bureau of Retirement Insurance and Occupational Health, Form 41-26 (Jan., 1973) at pp. 3, 8. In fact, apart from medical insurance, the E. E. O. C. itself placed special restriction on pregnancy leave through May 25, 1973. See U. S. E. E. O. C. Manual, Memorandum—"Advanced Sick Leave" (Dec. 20, 1972 and Jan. 26, 1973); U. S. E. E. O. C. Manual § 911(v) (Nov. 15, 1968 and July 25, 1969).

26. For example, an employer whose plan excluded sickle-cell anemia or Tay-Sachs, with concomitant inclusion of actuarially in-

did not, and could not, demonstrate that Liberty's pregnancy exclusion is based on pretextual considerations. To the contrary, pregnancy coverage is excluded because such coverage is "extraordinarily expensive" (*Aiello,* 417 U. S. at 493-494, and n. 18) due to its actuarially relevant dissimilarities from covered illnesses and injuries. Pregnancy thus has numerous characteristics in common with other excluded disabilities which, in many instances, are similarly concentrated in the members of a particular sex, race or religious group. See pp. 19-20 and nn. 33-38, *infra.* Inclusion of all these risks, which presumably would also be mandated by the decision below, would drastically alter the nature and function of present disability plans and distort the allocation of plan benefits.

The Liberty disability income plan has the same objective as the California plan in *Aiello:* ". . . to provide the broadest possible disability protection that would be affordable by all employees . . . ." *Id.* at 493. Since no benefit package can satisfy all the wants of all employees, risks which drain a disproportionate share of benefit dollars must be excluded to

distinguishable disorders, would have great difficulty rebutting a contention that these exclusions were designed to effect invidious discrimination. A disability income plan is likewise open to attack insofar as it may exclude abnormal complications encountered during pregnancy, *i.e.,* disabilities attributable to causes other than normal pregnancy and delivery, where those claims are not actuarially dissimilar from disabilities arising in non-pregnancy situations. In the instant case, although the Liberty plan does exclude "any cause related to pregnancy" (Appendix A p. 3; App. pp. 89, 99), that term has not been defined in the plan, the matter was never raised by the Respondents, and there is no record evidence, nor discussion by the trial court, of its implications. The abnormal complications question, therefore, is not before the Court in this case just as it was not at issue in *Aiello.* 417 U. S. at 491-492. It should be noted, however, that the Court of Appeals misconstrued the plan's coverage by assuming that the plan "would not cover a disability suffered by a pregnant woman but would have covered the disability had the woman not been pregnant." Pet. App. p. A8. In fact, the term "any cause related to pregnancy" is narrowly construed to encompass only those disabilities arising wholly and solely from pregnancy. All other disabilities incurred by pregnant women are covered.

enable the plan to provide a satisfactory level of benefits.[27] For Liberty, if pregnancy had been a covered risk, the number of claims under its plan would have increased 25 to 26%, necessarily requiring a contraction of the benefits available for other risks. App. p. 190. For American industry as a whole, one actuary estimated that, without such a contraction, adding pregnancy coverage to current disability income plans would cost an additional $1.35 billion annually. *Gilbert* v. *General Electric Co.,* 375 F. Supp. at 378. There are other similar figures: the 33 to 36% cost increase estimate by California in *Aiello* (417 U. S. at 494, n. 18); the 40 to 50% cost increase estimate by the Health Insurance Association of America and the American Life Insurance Association (Statement to O. F. C. C. pursuant to 38 Fed. Reg. 35336-35338 (1973)); the experiences encountered in providing pregnancy coverage under the New Jersey, Hawaii and Rhode Island disability state plans;[28] and the estimate on the part of American Telephone and Telegraph Company that, if pregnancy had been included under its policy, assuming an average maternity leave period of 5½

27. The California disability income program, as well as the General Electric plan in *Gilbert* v. *General Electric Co., supra,* include many risks excluded by the Liberty plan. Both plans provide, however, only 26 weeks of coverage and benefit maximums of $105 and $150 a week, respectively, whereas the Liberty plan provides, for an employee with only three months employment, two years of coverage and a benefit maximum of $150 a week, and, for an employee with five years or more service, a maximum of $275 per week until the employee attains the age of 65.

28. In New Jersey, where claims are limited to eight week duration, pregnancy claims accounted for between 49.09% and 57.51% of all benefits paid under that plan between 1969 and 1973. Coverage of pregnancy under the Hawaii disability plan resulted in an increase in female disability premiums from $4.00 a month to $8.76 a month. Reply Brief of Appellant in *Aiello,* pp. 17-18. Rhode Island initially included payments for pregnancy related work absences in its program but in 1946 placed limits thereon after it had incurred a deficit of $1.5 million between 1944 when the plan began and mid-1946. Brief of Appellant in *Aiello,* p. 11. Even thereafter, in 1949-1950, Rhode Island still paid out 30.4% of its total benefits for pregnancy related disabilities. Comment, 75 Col. L. Rev., *supra* n. 7, at 480, n. 202.

months, in 1970-1 and 1971-2 its costs would have increased by $32.7 and $39.5 million, respectively (Brief *amicus curiae* to the Court of Appeals, pp. 8-9). Due primarily to this prohibitive cost, pregnancy has been historically differentiated in disability income plans[29] and, in accord, is excluded from the Liberty plan. This is a legitimate consideration here as it was in *Aiello* and in other cases where this Court has upheld the validity of fiscal concerns "in the area of economics and social welfare." *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970); *Jefferson* v. *Hackney*, 406 U. S. 535, 546 (1972).

Pregnancy also differs from covered illnesses and injuries in terms of its nature, severity, duration and frequency. "[P]regnancy is a normal biological process" (*Cohen* v. *Chesterfield County School Bd.*, 414 U. S. 632, 652 (Powell, J., concurring)); in contrast to covered illnesses, pregnancy is normally a desired occurrence that is planned, voluntary and not influenced by a motivation to recover. It occurs, as the District Court below noted, "with certainty and regularity" (Pet. App. p. A37) and is "neither a sickness nor a disability . . . in the usual sense of the word[s]." *Newmon* v. *Delta Airlines*, 374 F. Supp. 234, 245-6 (N.D. Ga. 1973).[30] It also generally results in an

29. Pregnancy coverage has been excluded, or severely restricted, in most disability income plans. See, *e.g.*, U. S. Department of Labor, Bureau of Labor Statistics, Digest of 100 Sel. Health Insurance Plan under Collective Bargaining, Early 1966, Bull. No. 1502 (1966); and Koontz, *Child Birth and Child Rearing Leaves: Job Related Benefits*, 17 N. Y. L. F. 480, 491-492 (1972). "Such widespread use", as the Sixth Circuit recently observed, " 'is plainly worth considering' in determining the 'rationality' of . . . [employment] requirements." *Smith* v. *Troyan*, ... F. 2d ....., 143 Daily Lab. Rep. F-1, F-2 (July 24, 1975) (6th Cir. July 3, 1975), quoting *Manning* v. *Rose*, 507 F. 2d 889, 892 (6th Cir. 1974).

30. It is these statistical and quantitative differences, as well as the totally different cost involved, that distinguishes pregnancy from those "voluntary" disabilities, *e.g.*, certain forms of cosmetic surgery, covered by the Liberty plan. See Reply Brief of Appellant in *Aiello*, pp. 11-12 ("Truly voluntary cosmetic surgery represents a miniscule portion of the claims filed under the UIC, approximately 0.12% of all disability claims filed . . . . [O]f these claims, 85.5% were filed by women").

absence from employment which is substantially longer than any actual inability to work, and is significantly influenced by concern for the welfare of the child in addition to that of the mother.[31] Pregnancy further results, to a far greater extent than covered illnesses, in a decision to leave the work force.[32] Pregnancy, accordingly, has "unique characteristics" (*Aiello*, 417 U. S. at 496, n. 20) that are significantly dissimilar from the disabilities covered by the Liberty plan. These "characteristics peculiar to only one group rationally explain the [plan's different] . . . treatment of the two groups." *Johnson* v. *Robison*, 415 U. S. 361, 378 (1974).

The exclusion of pregnancy is predicated upon many of the same considerations—a substantial degree of personal volition, a frequency and duration rate which dwarfs covered conditions, the greater likelihood of non-return to work, and the resultant abnormal cost—that distinguish the plan's other exclusions. Those exclusions, moreover, may also be concentrated in a particular sex, race or religious group. For example, the exclusion of disabilities due to an act of war affects virtually only males; males in active military service outnumber females by in excess of 20 to 1 with the percentage in combat service presumably far greater.[33] The exclusion of attempted suicides

31. See Brief of Appellant in *Aiello*, p. 20.

32. As noted in Comment, 75 Col. L. Rev., *supra* n. 7, at 480-1:
"General Electric has estimated that 40 percent of its employees who take pregnancy leave do not return to their jobs afterward. American Telephone and Telegraph says it loses 48 percent of its employees after maternity leaves. Since part of the impetus behind an employer's provision of temporary disability benefits is to keep the recipient as a permanent member of his work force, payments made to women who leave their jobs permanently or semi-permanently, for whatever reason, following childbirth constitute in a sense a bonus to the woman and a loss to her employer (footnotes omitted)."

See also the Brief *amicus curiae* of American Telephone and Telegraph Company to the Court of Appeals, pp. 11-12; and the Brief of Appellant in *Aiello*, p. 21.

33. Department of Defense, Directorate of Manpower and Reserve Affairs, *Selected Manpower Statistics*, Tables P 26.0 and P 25.6 (1975).

and self-inflicted injuries also predominately affects males. There were, for example, in 1972 (the most recent year in which statistics are available), over twice as many male suicides as female.[34] Similarly, because there are approximately two male alcoholics for each female, if not a higher percentage,[35] as well as substantial differences among religious groups,[36] the effect of the plan's exclusion of disabilities due to alcoholism would also be concentrated in members of particular groups. The substantially disproportionate number of blacks who are reported narcotic addicts[37] and who are admitted to outpatient psychiatric services and public mental health institutions[38] would likewise presumably render susject the plan's exclusion of disabilities arising from mental or emotional disorders. Presumably, similar statistics may also be discovered with respect to the plan's exclusion of short-term disabilities and maximum payment periods. Cf. *Aiello*, 417 U. S. at 495 and n. 19.

For all the foregoing reasons, Liberty's exclusion of pregnancy cannot be presumed to be a "mere pretext designed to affect an invidious discrimination" against its female employees.

34. U. S. Bureau of the Census, *Statistical Abstract of the U. S.: 1974* (95th ed. 1974), p. 150.

35. National Clearinghouse for Alcohol Information, *Second Report to Congress*, p. 1 (1974); see also National Clearinghouse for Mental Health Information, "Primary Diagnosis of Discharges from General Hospital Psychiatric Inpatient Units" (hereafter "Primary Diagnosis"), Stat. Notes No. 68, 76 and 81 (1973)), indicating that, in terms of either "Disorders", "Disorders in Additions to Psychiatric Facilities" or "Characteristics of Residents of Alcoholism Halfway Houses", the ratio exceeds four males for each female.

36. See Snyder, *Alcohol and the Jews* (Yale Center of Alcohol Studies, 1958), p. 3.

37. See *Statistical Abstract of the U. S.: 1974, supra* n. 34, at p. 87.

38. Primary Diagnosis, *supra*, n. 33, Stat. Notes 41 and 79.

III. The Exclusion of Pregnancy from Liberty's Disability Income Plan Does Not Contravene Griggs v. Duke Power Co.

In *Griggs*, in order to effectuate the Act's objective of removing "artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification" (401 U. S. at 431), this Court proscribed job requirements which excluded disproportionate numbers of a protected group from job opportunities where such requirements could not be justified. The Court of Appeals found *Griggs* applicable to this case; that because Liberty's pregnancy exclusion ". . . treats a protected class in a disparate manner . . . [t]his is precisely what Title VII intends to strike down." Pet. App. p. A14. Even assuming *arguendo*, however, that a pregnancy exclusion in a disability income policy, in contrast, *e.g.*, to a maternity exclusion in a leave of absence policy,[39] can be termed a "barrier to employment," *Griggs* is inapposite. By excluding pregnancy coverage from its disability income plan, Liberty did not cause a disparity in benefits between its male and female employees. The pregnancy exclusion, moreover, is rationally related to the plan's objectives.

Respondents have never claimed, let alone established a requisite *prima facie* case, that the plan's pregnancy exclusion deprived Liberty female employees of a proportional share of benefits. Such a position would manifestly be untenable. Here, as in *Aiello*, "[t]he fiscal and actuarial

39. A maternity exclusion in a leave of absence policy necessarily results in a high risk of loss of employment or, even if a job is available upon the woman's return, a loss of seniority, benefits and promotional opportunities. Where, therefore, a leave of absence is granted for other similar reasons, and the maternity exclusion cannot be justified by business necessity, there is an artificial barrier to employment. Here, where the right of a female employee to take maternity leave is not now challenged, there has been no deprivation of employment opportunities.

benefits of the program accrue to [all] members of both sexes . . .," a pregnant woman receives ". . . insurance protection equivalent to that provided all other . . . employees." 417 U. S. at 497 and n. 20.[40] Moreover, as demonstrated in *Aiello* (417 U. S. at 497, n. 21), there is already a disproportionately greater claim rate and claim cost for females under disability plans. For example, one expert concluded that "the loss experiences of women, *even with pregnancy costs excluded,* may run two and a half times higher than costs for men."[41] The experiences of General Electric Company[42] and American Telephone and Telegraph Company[43] bear out these estimates. If pregnancy is covered, as the State of California observed in *Aiello,* the result would be the

> . . . creation of a new welfare program . . . 36% of all benefits will be devoted exclusively to benefits for normal pregnancy, and concentrated in the hands of the approximately 5% of female workers who are pregnant each year. Since normal pregnancy constitutes by far the largest single category of disability benefits, it would result in a truly dramatic benefit advantage for female workers.[44]

40. Many of the covered benefits, *e.g.,* hysterectomies, breast and uterine cancer and the removal of ovarian cysts, are disabilities limited to or primarily affecting females.

41. Herbert C. Dennenberg, former Commissioner of Insurance for the State of Pennsylvania, in testimony before the Joint Economic Committee of Congress on the "Economic Problems of Women", 93 Cong., 1st Sess., Report of Proceedings, Vol. 3 (1973), at p. 198 (emphasis added).

42. See *Gilbert* v. *General Electric Co.,* 375 F. Supp. at 378, where it was noted that female employees there received 170% more in benefits, with a pregnancy exclusion, than did male employees. With pregnancy covered, it was estimated that the differential would rise to 330%.

43. Brief *amicus curiae* to the Court of Appeals, p. 5:

> In 1970-71, women accounted for 64.65% of the total days for which benefits were paid, even though they were only 48.57% of the total work force eligible for benefits. Similarly, in 1971-1972, women received compensation for 63.45% of the total benefit days though representing only 48.29% of employees eligible for benefits.

44. Brief of Appellant in *Aiello,* pp. 35-6.

The Act, however, seeks only to insure equality of employment opportunity, not to provide a compensatory advantage for either men or women. *Griggs* ". . . lend[s] no support to [Respondents] . . . [because] the plain fact of the matter is that [the Liberty plan] does not discriminate against [women]." *Espinoza* v. *Farah Manufacturing Company,* 414 U. S. at 92-93.

Even where there are "variances in the . . . composition of the different . . . programs", if the variation "is *rationally related* to the purpose of the . . . programs . . . *Griggs* . . . is therefore inapposite." *Jefferson* v. *Hackney,* 406 U. S. 535, 549, n. 19 (1972) (emphasis supplied). Here, as shown above, Liberty's pregnancy exclusion was rationally related to its purpose of providing broad disability protection within affordable financial limits. To disregard such an objective would lead to bizarre results. An employer, for example, who provided disability protection against only cancer would presumably be immune from attack because, in contrast to the decision below, "nearly all disabilities [would not be] . . . covered" (Pet. App. p. A13); an employer, however, who covered many "temporary disabilities but excludes pregnancy" (*ibid.*), would if the decision below is affirmed, be in violation of the Act. Absent a demonstration of gender inequality with respect to plan contributions, aggregate risk coverage or actual distribution of benefits, however, there is no logical difference. Either both companies have complied with the intent of Title VII or both "had the purpose or effect of discriminating against [females]." *Espinoza* v. *Farah Manufacturing Company,* 414 U. S. at 92. To construe *Griggs* to find both plans unlawful would require that there must be "a greater economic benefit" provided whenever there are biological differences,[45] manifestly

45. Biological differences, *e.g.,* age, height, weight or the health history and life expectancy unique to each sex, provide objective actuarial criteria upon which all insurance is based. These distinctions prevent inequitable subsidies by one segment of an insured group for the benefit of another and permit all members to share the savings inherent in group coverage. They "are more a fact of life than an

necessitating more than "one exception to the cost of differential defense."[46] *Griggs*, it is submitted, does not require such preferential treatment.

IV. The E. E. O. C.'s Current Guidelines Do Not Merit Deference.

The Court of Appeals placed substantial reliance on the E. E. O. C.'s current guidelines, 29 C. F. R. §§ 1604.9 and 1604.10 (Pet. App. pp. A9-A12 and n. 5). Even assuming the guidelines are applicable,[47] any deference thereto was misplaced.

invidious discrimination." Comment, *Developments—Title VII*, 84 Harv. L. Rev. 1109, 1174-5 (1971). Cf. *Smith* v. *Troyan, supra* (upholding height requirement for police officers notwithstanding disparate impact on females); and *Reynolds* v. *McNichols*, 488 F.2d 1378, 1383 (10th Cir. 1973) (upholding city "hold and treat" ordinance for prostitutes).

Benefit variations predicated on such biological differences were, as already noted, originally approved by the E. E. O. C. and still are approved by the Wage and Hour Administrator and the O. F. C. C. See pp. 12-14 and nn. 18-22. Similarly, the Department of Labor permits benefit variations based on age differences. See 29 C. F. R. 860.120. And, at the state level, the California Fair Employment Practices Act provides:

> Nothing contained in this part relating to discrimination on account of sex shall be deemed to affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan, provided such terms or conditions are in accordance with customary and reasonable or actuarially sound underwriting practices. Calif. Lab. Code, Part 4.5 § 1432.

Similarly, Section XI of the sex discrimination guideline of the Illinois Fair Employment Practices Commission provides that

> . . . differences in contributions, benefits or other provisions in [fringe benefit insurance] plans which are adopted in good faith based on sound actuarial data may not be deemed to violate the Act.

46. Cf. Brief of the E. E. O. C. as *amicus curiae* to the Court of Appeals pp. 23-4, quoting *Gilbert* v. *General Electric Company*, 375 F. Supp. at 383.

47. The guidelines provide that a "disability due to pregnancy or childbirth . . ." shall be treated "on the same terms and conditions as . . . *other temporary disabilities.*" (emphasis added). The guidelines provide, however, no standards to adjudicate a policy which excludes some temporary disabilities other than pregnancy. The guidelines thus do not pertain to a situation, as in this case, where the employer does not have a separate "temporary disability" policy but has a permanent disability policy which, by sacrificing protection against some short term disabilities, provides quality long-term protection.

First, the guidelines do not represent the contemporaneous construction of a statute. They have not ". . . been acted on for a number of years . . ." (*Udall* v. *Tallman*, 380 U. S. 1, 18 (1965)) nor do they have ". . . that consistency to which [this Court] should yield [its] judgment." *Fishgold* v. *Sullivan Drydock & Repair Corporation*, 154 F. 2d 785, 789, *aff'd*, 328 U. S. 275 (1946). Rather, as already shown, there is no legislative history supporting the Commission's view;[48] the present guidelines were adopted eight years after the Act was passed; and, like the E. E. O. C. guidelines in *Espinoza*, ". . . the Commission itself once held a different view. . . ." 414 U. S. at 94. See also *United Housing Foundation* v. *Forman*, ... U. S. ....., 95 S. Ct. 2051 at n. 24 (1975).

Second, the E. E. O. C.'s dramatic reversal of its prior position was not accompanied by ". . . the thoroughness evident in its consideration . . . [and] the validity of its reasoning . . . which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). There were no public hearings or comments, no intervening statutory developments or no compelling studies to warrant a deviation from the

48. The will of Congress, as reflected by the 1972 amendments to the Act, was, if expressed at all, to continue the Commission's then-existing policy of sanctioning a pregnancy exclusion. See pp. 11-15, *supra*. As the Fifth Circuit *en banc* recently observed, in view of the "inconclusive" legislative history and "insufficiently developed" state of law, "Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate." *Willingham* v. *Macon Tel. Publishing Co.*, 507 F. 2d 1084, 1090 (5th Cir. 1975). "[A]pplication of the guidelines . . ." here, as in *Espinoza* (414 U. S. at 94), would thus ". . . be inconsistent with an obvious congressional intent not to reach the employment practice in question."

Commission's previously well-established position that a pregnancy exclusion from an income protection plan was not discriminatory. To the contrary, the E. E. O. C. ". . . conducted no medical studies . . . [or] financial studies"; the responsible personnel "had no expertise in medicine, economics, or labor relations . . . [or] empirical data upon which to base the new guidelines."[49] There was, in sum, ". . . no factual basis upon which these regulations were drawn." *Newmon* v. *Delta Air Lines*, 374 F. Supp. at 245.

Finally, for all of the reasons discussed in the preceding sections of this brief, here, as in *Espinoza*, "Courts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong'." 414 U. S. at 94-95. There is in the instant case the compelling absence of any ". . . good reason to treat the guidelines as expressing the will of Congress." *Griggs*, 401 U. S. at 434.

49. Comment, *Current Trends in Pregnancy Benefits—1972 EEOC Guidelines Interpreted*, 24 DePaul L. Rev. 127, 130-131 (1974), which also argues, as the Fourth Circuit noted but found "beside the point" in *Gilbert* v. *General Electric Co.* (126 Daily Lab. Rep. at D-2, n. 12), that the guidelines were improperly issued and are invalid by virtue of the Administrative Procedure Act, 5 U. S. C. § 553, and the limitations placed on the Commission's rule-making authority by Section 731(a) of the Act.

CONCLUSION

For all the foregoing reasons, it is respectfully prayed that the judgment of the Court of Appeals be reversed insofar as it affirmed the District Court's grant of summary judgment and found that Liberty's disability income protection plan is violative of the Act.

Respectfully submitted,

KALVIN M. GROVE
LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
LEDERER, FOX AND GROVE
Sears Tower—Suite 7916
233 South Wacker Drive
Chicago, Illinois 60606

ROBERT A. PENNEY
175 Berkeley Street
Boston, Massachusetts 02226

CLEM R. KYLE
717 Liberty Avenue
Pittsburgh, Pennsylvania 15222
Attorneys for Liberty Mutual Insurance Company

A1

APPENDIX A

Excerpts from Liberty Mutual Insurance Company's Current Employee Group Benefit Handbook

OUR
GROUP
BENEFIT PLANS

APPENDIX A

BEST COPY AVAILABLE

A2

INCOME PROTECTION

When disability from illness or accident keeps you away from work, your Income Protection plan is designed to continue a portion of your usual earnings.

INSURANCE BENEFITS begin with the eighth day of disability. Employees with more than three months but less than five years of continuous full time service will receive a benefit of two-thirds of salary to a maximum of $150.00 per week, for 103 weeks.

Employees with five years or more of continuous full time service will receive a benefit of two-thirds of salary to a maximum of $275.00 per week to the first of the month in which the employee attains age 65. These benefits are payable during the first year of disability if you are unable to perform the duties of your occupation. Benefits are payable beyond the first year of disability only if you are unable to perform the duties of any occupation.

Benefits payable for any week of disability will be reduced by amounts payable under workmen's compensation and similar laws, social security laws (primary and dependent benefits) and other statutes, any retirement plan, any group insurance plan except a group policy held by Liberty Mutual, and any remuneration earned during such week.

Benefits are payable for each period of disability. Successive periods due to the same or related causes will be considered one period of disability.

Limitations On Insurance Benefits:

Benefits are not payable for disability due to pregnancy or any cause related to pregnancy, any act of declared or undeclared war, attempted suicide or intentionally self-inflicted injury, or for any disability which does not require throughout its continuance the regular attendance of a physician licensed to prescribe and administer all drugs and to perform all surgical procedures.

No benefits will be paid beyond the first of the month in which the employee attains age 65.

No benefit is payable for any portion of a period of disability due to mental or emotional disorder, alcoholism, or drug addiction unless the employee is engaged in a corrective program under the guidance of a licensed physician.

If you are absent from work for any reason, other than vacation or paid excused absence, on the date the insurance or an increase in the duration and amount of benefits would otherwise become effective, the insurance, or the increase, will not be effective until your return to work on a full-time basis.

SUPPLEMENTARY SALARY BENEFITS are provided by the Company to help fill the gap between insurance benefits and your usual earnings.

BEST COPY AVAILABLE

In cases covered by insurance under the Income Protection Plan, Liberty Mutual pays your full salary for the first week of disability. Then, for as many weeks as you have completed years of service with the Company, it pays one-half the difference between full salary and the insurance benefits.

YOUR COST for the Income Protection Insurance benefits is 33 cents for each $100 of salary. (This is less than one-third of the cost; Liberty Mutual pays the balance for you.) For example:

At Weekly Salary of	Bi-Weekly Salary of	Bi-Weekly Cost (Payroll Deduction)
$ 80.	$160.	$ .53
100.	200.	.66
150.	300.	.99
225.	450.	1.49 (max.)

These rates apply in all states except those where compulsory laws necessitate slight variations. The rates are based on present insurance costs and are subject to change if insurance costs change.

Income Protection Insurance is taken by all full time employees as a condition of employment.

SPECIAL STATUTORY DISABILITY BENEFITS apply in California, Hawaii, New Jersey, New York, Puerto Rico and Rhode Island. Employees in most of these places will be covered for the statutory benefits from the first day of employment. You still become eligible for the Income Protection plan after completing three months of continuous full-time employment.

If you are employed in one of these areas and disability occurs after you are insured for Income Protection, you will receive under the Income Protection plan the difference between the amount paid by statutory accident and sickness insurance and the benefit you would ordinarily receive from the Income Protection plan.

* * * *

Supreme Court, U.S.
FILED
SEP 26 1975
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1974

No. 74-[illegible]

LIBERTY MUTUAL INSURANCE COMPANY,
a Corporation,

Petitioner,

v.

[illegible] and MARTROSS, on Behalf of
Themselves and All Others Similarly Situated,

Respondents

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENTS

Howard A. Specter
1820 Grant Building
Pittsburgh, Pennsylvania 15219
Attorney For Respondents

Of Counsel:

[illegible] & [illegible], P.A.
[illegible]
[illegible] 15219
[illegible]
[illegible]
[illegible] 15219

INDEX

	PAGE
TABLE OF CITATIONS	ii
QUESTION PRESENTED	1
COUNTERSTATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. Respondents Established A *Prima Facie* Violation Of Title VII With Respect To Terms, Conditions And Privileges Of Employment By Demonstrating Their Employer's Imposition Of A Contributory Disability Insurance Program To Which Employees Must Subscribe As A Condition Of Employment And Which, With The Exception Of Intentionally Self-Inflicted And War Time Disabilities, Provides Benefits For All Disabilities To Which Male Employees May Be Subjected Without Providing Benefits For All Disabilities To Which Female Employees May Be Subjected.	10
A. Respondents carried their Title VII burden of showing membership in a protected class and the adverse effect of the challenged employment practice on that class, and thereby shifted to their employer the burden of proving justification.	11
B. Although approval of the Equal Employment Opportunity Commission's Guidelines is not crucial to the demonstration of a *prima facie* case, the Guidelines are nevertheless entitled to judicial deference.	15
C. Existing decisional law demonstrates that Respondents have established a *prima facie* violation of Title VII.	22
II. To The Extent That Defenses May Exist To Claims Similar To Those Asserted Herein, None Were Raised By Or Available To The Petitioner.	30
CONCLUSION	37

TABLE OF CITATIONS

CASES	PAGE
Albemarle Paper Co. v. Moody, 43 U.S.L.W. 4880 (U.S. June 25, 1975)	11, 16, 23
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	11, 25
Board of Education v. New York State Division of Human Rights, 42 App.Div.2d 49, 345 N.Y.S.2d 93 (1973), *aff'd,* 35 N.Y.2d 673, 360 N.Y.S.2d 887 (1974)	20
Board of Education v. New York State Division of Human Rights, 42 App.Div.2d 600, 345 N.Y.S.2d 101 (1973), *aff'd,* 35 N.Y.2d 677, 360 N.Y.S.2d 888 (1974)	21
Board of Education v. State Division of Human Rights, 42 App.Div.2d 854, 346 N.Y.S.2d 843 (1973), *aff'd,* 35 N.Y.2d 675, 360 N.Y.S.2d 887 (1974)	20
Cedar Rapids Community School District v. Parr, —— Iowa ——, 227 N.W.2d 486 (1975)	21
Cerra v. East Stroudsburg Area School District, 450 Pa. 207, 299 A.2d 277 (1973)	21
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)	27
Communications Workers v. American Telephone & Telegraph Co., 513 F.2d 1024 (2d Cir. 1975), *petition for cert. docketed at* No. 74-1601 (June 19, 1975)	16, 24, 26, 27
Dessenberg v. American Metal Forming Co., 8 EPD ¶9575 (N.D.Ohio 1973)	25
Doe v. Osteopathic Hospital, 333 F.Supp. 1357 (D. Kan. 1971)	25
Edwin L. Wiegand Co. v. Jurinko, 414 U.S. 970 (1973) *(per curiam)*	11
Espinoza v. Farah Manufacturing Co., Inc., 414 U.S. 86 (1973)	11, 15, 16, 17, 20

CASES	PAGE
Farkas v. South Western City School District, 8 EPD ¶9619 (S.D.Ohio 1974), *aff'd without opinion,* 506 F.2d 1400 (6th Cir. 1974)	25
Geduldig v. Aiello, 417 U.S. 484 (1974)	9, 13, 16, 22, 23, 24, 28, 29
Gilbert v. General Electric Co., 375 F.Supp. 367 (E.D.Va. 1974), *aff'd,* —— F.2d ——, 10 FEP Cases 1201 (4th Cir. 1975)	14, 31, 32
Gilbert v. General Electric Co., —— F.2d ——, 10 FEP Cases 1201 (4th Cir. 1975)	15, 16, 24
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	11, 15, 30, 31
Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973)	31
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)	31
Holthaus v. Compton & Sons, Inc., 514 F.2d 651 (8th Cir. 1975)	14, 16, 24
Hutchison v. Lake Oswego School District, —— F.2d ——, 11 FEP Cases 161 (9th Cir. 1975)	16, 24, 30
Keyes v. School District No. 1, 413 U.S. 189 (1973)	28
Lillo v. Plymouth Local Board of Education, 8 EPD ¶9510 (N.D.Ohio 1973)	25
Liss v. School District, 10 EPD ¶10,312 (E.D.Mo. 1975), *appeals docketed at* Nos. 75-1440, 1447 (8th Cir.)	24
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	11, 23
Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973), *vacated,* 43 U.S.L.W. 4880 (U.S. June 25, 1975)	31
Newmon v. Delta Air Lines, Inc., 374 F.Supp. 238 (N.D.Ga. 1973)	25

CASES	PAGE
Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) *(per curiam)*	14
Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1972)	18
Ray-O-Vac v. Wisconsin Department of Industry, Labor & Human Relations, 8 EPD ¶9656 (Wis. Cir. Ct. 1974), *appeal pending in* Wis. Sup. Ct.	21
Sale v. Waverly-Shell Rock Board of Education, 390 F.Supp. 784 (N.D.Iowa 1975), *leave to appeal denied,* Misc. No. 75-8088 (8th Cir., January 31, 1975)	24
Satty v. Nashville Gas Co., —— F.2d ——, 11 FEP Cases 1 (6th Cir. 1975)	16, 24, 25
Shafer v. Reo Motors, Inc., 205 F.2d 685 (3rd Cir. 1953)	30
Singer v. Mahoning County Board of Mental Retardation, 379 F.Supp. 986 (N.D.Ohio 1974), *aff'd on other grounds,* —— F.2d ——, 10 EPD ¶10,287 (6th Cir. 1975) *(per curiam)*	15, 25
Union Free School District No. 6 v. New York State Human Rights Appeal Board, 35 N.Y.2d 37, 362 N.Y.S.2d 139 (1974)	21
United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied,* 406 U.S. 906 (1972)	31
Vick v. Texas Employment Commission, 6 EPD ¶8933 (S.D.Tex. 1973), *aff'd in part, rev'd in part on other grounds,* 514 F.2d 734 (5th Cir. 1975)	25
Vineyard v. Hollister Elementary School District, 64 F.R.D. 580 (N.D.Cal. 1974)	15
Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3rd Cir. 1975), *cert. denied,* 43 U.S.L.W. 3643 (U.S. June 9, 1975)	5
Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199 (3rd Cir. 1975), *cert. granted,* 95 S.Ct. 1989 (1975)	5

CASES	PAGE
Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084 (5th Cir. 1975) *(en banc)*	24
Women in City Government United v. City of New York, —— F.2d —— (2d Cir., April 14, 1975) *(per curiam), petitions for cert. docketed at* Nos. 75-70, 71 (July 12, 1975)	24
Zichy v. City of Philadelphia, 392 F.Supp. 338 (E.D. Pa. 1975)	25

STATUTES AND RULE OF COURT

Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 *et seq.*	19
F.R.Civ.P. 54(b)	5
42 U.S.C. §2000e-2(e)	31
45 U.S.C. §351 (k) (2)	17
Section 431(d)(1) of the General Education Provisions Act, as amended by Section 509(a)(2) of the Education Amendments of 1974, 20 U.S.C. §1232(d)(1)	19

OTHER AUTHORITIES	PAGE
Brief of American Telephone & Telegraph Company in *Wetzel v. Liberty Mutual Insurance Co.*, 511 F.2d 199 (3rd Cir. 1975)	33
5 C.F.R. §630.401(b)	17
45 C.F.R. §86.57, 40 Fed.Reg. 24144 (June 4, 1975)	20
Comment, Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination, 75 Columbia L.R. 441 (1975)	21, 22
EEOC Decision, Case No. LA 68-4-538E (June 16, 1969)	18
EEOC Decision No. 71-562 (December 4, 1970)	18
EEOC Decision No. 71-1474 (March 19, 1971)	18
38 Fed.Reg. 35336 (December 27, 1973)	20
40 Fed.Reg. 29074 (July 24, 1975)	20
Letter of August 21, 1975, from Kalvin M. Grove, counsel for Petitioner, to Judge Gerald Weber of the United States District Court for the Western District of Pennsylvania	5
Prentice Hall, Personnel Management, Policies and Practices, Report Bulletin 25 (June 6, 1972)	34
S.Rep. No. 415, 92d Cong., 1st Sess. (1971)	18, 19
U. S. Department of Commerce, Bureau of the Census, *1970 Census of Population* (1973)	13
U. S. Department of Labor, Bureau of Labor Statistics, *Digest of Health and Insurance Plans* (GPO 1972)	34, 35

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
a Corporation,
Petitioner,

v.

SANDRA WETZEL and MARI ROSS, on Behalf of Themselves and All Others Similarly Situated,
Respondents

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Did Respondents establish a *prima facie* violation of Title VII with respect to terms, conditions and privileges of employment by demonstrating that their employer imposes a contributory disability insurance program to which its employees must subscribe as a condition of employment and which, with the exception of intentionally self-inflicted and war time disabilities, provides benefits for all disabilities to which male employees may be subjected without providing benefits for all disabilities to which female employees may be subjected?

COUNTERSTATEMENT OF THE CASE

Petitioner Liberty Mutual Insurance Company is a national insurance underwriting company with offices throughout the United States (A. 16-17, 20).[1] Respondents Sandra Wetzel and Mari Ross, two of Petitioner's female employees, commenced this Title VII class action in February, 1972, at a time when Mari Ross was on a maternity leave of absence. Respondents challenged their employer's hiring and promotion practices, its pregnancy-related employment practices and its practice of providing disparate compensation for certain "male" and "female" jobs.

Petitioner provides a contributory disability insurance program (Income Protection Plan) to which its employees must subscribe as a condition of employment (A. 91, 93, 95, 98, 100).[2] Of all medically verifiable disabilities, other than those resulting from acts of war or intentionally self-inflicted injuries, only "disability due to pregnancy or any cause related to pregnancy" is excluded from coverage (A. 42-43, 90, 92, 94-95, 96-97, 98-99). The plan has always been contributory, and the employee's mandatory contribution has ranged from approximately ⅓ to fully ½ of the cost of coverage (A. 91, 93, 95, 97, 99). In addition to the income protection provided by the insurance plan, supplementary salary benefits, which partially fill the gap between insurance benefits and a disabled employee's usual earnings,

---

1. "A. —" references are to page numbers of the Appendix.

2. The "current" plan which comprises "Appendix A" to the Brief for Petitioner was never part of the record in this case, differs from the one before this Court and had never been seen by Respondents before receipt of the Brief.

are paid by the Petitioner. In cases covered by insurance under the Income Protection Plan, Petitioner pays the employee's full salary for the first week of disability. Thereafter, it pays ½ the difference between full salary and the insurance benefits for as many weeks as the employee has completed years of service (A. 90, 93, 95, 97, 99). Because pregnancy-related disabilities are not covered by insurance under the Income Protection Plan, no supplementary salary benefits are paid for such disabilities. In cases of long-term illnesses due to pregnancy where a physician is seen, an employee's supervisor has discretion to consider the first five days of such absences as payable under the Company's short-term absence policy. A different, more liberal, short-term absence policy applies to all other disabilities (A. 88-89).

Until March, 1967, pregnant employees were discharged after the sixth month of pregnancy. In March, 1967, Petitioner modified its policy slightly so that pregnant employees were not fired until after the eighth month of pregnancy. These automatic terminations continued until September, 1970, when Petitioner began to impose unpaid leaves of absence as an alternative to mandatory discharge. Employees were placed on forced leaves of absence after the eighth month of pregnancy and were required to return to work no later than six (6) months from commencement of the leave or three (3) months from the date of delivery, whichever came first. The policy was modified in November, 1971, to enable an employee to work for as long as her physician verified her ability to continue prior to delivery. The mandatory return dates, which were applied without regard to disabling complications, remained in force. These discharge, leave and return date practices applied to no other disabilities (A. 153, 157).

Comprehensive discovery concerning hiring and promotion revealed, *inter alia,* that of the 3,129 persons hired for the job of Claims Adjuster during nearly seven (7) years following the effective date of Title VII, 3,127, or 99.99%, were men, and that of the 2,329 persons hired for the lower paid position of Claims Representative during the same period, 2,302, or 98.84%, were women (A. 136). Discovery also disclosed that no employee could aspire to any position in the Claims Department above that of Claims Adjuster without first becoming a Claims Adjuster, a position limited to men (A. 135-37).

Wetzel and Ross moved for summary judgment on the issues of liability for the hiring and promotion and pregnancy-related practices. The only explanation which Petitioner ever gave for its pregnancy-related employment practices consisted of the deposition testimony of Kenneth D. Spaulding, its Manager of Personnel Services, who testified that the policies were adopted "on advice of counsel" (A. 36, 38, 43). Petitioner consistently maintained that there was "no reliable basis to estimate the *cost* of providing pregnancy-related disability benefits" (A. 194), and offered no evidence of its own subjective basis for the pregnancy-related practices or of any financial or business consequences which might result from abandoning those practices. The trial court declared each of the pregnancy-related policies violative of Title VII (A. 157-59).[3]

---

3. Petitioner was equally silent concerning the reasons for its hiring and promotion practices. Those practices, too, were declared unlawful (A. 162-63).

The Respondents' third claim, that of discriminatory compensation, was tried to the district court sitting without a jury and is *sub judice.*

The trial court directed the entries of final judgments pursuant to F.R.Civ.P. 54(b). Petitioner filed two appeals, one with respect to its hiring and promotion practices and the class action aspects of this litigation, and the other with respect to those aspects of the pregnancy-related issues dealing with its income protection program and its policy of discharging disabled female employees who do not return to work from maternity leaves of absence by a date certain. The trial court's findings of liability were affirmed by the United States Court of Appeals for the Third Circuit in two separate opinions. *Wetzel v. Liberty Mutual Insurance Co.,* 508 F.2d 239 (3rd Cir. 1975), *cert. denied,* 43 U.S.L.W. 3643 (U.S. June 9, 1975); *Wetzel v. Liberty Mutual Insurance Co.,* 511 F.2d 199 (3rd Cir. 1975), *cert. granted,* 95 S.Ct. 1989 (1975).

The Petitioner seeks review only of those aspects of the court of appeals' decision dealing with the exclusion of benefits for pregnancy-related disabilities from its otherwise all-inclusive Income Protection Plan. Although only one practice has been offered for review, Respondents have summarized Petitioner's other employment practices and the rulings of the trial and appellate courts with respect to those practices because the practices are inter-related and because acceptance of Petitioner's argument may automatically revalidate its other pregnancy-related practices. In fact, Petitioner is urging the trial court to defer the issuance of an injunction against continuation of its other pregnancy-related practices pending this Court's decision.[4] If this

---

4. Letter of August 21, 1975, from Kalvin M. Grove, counsel for Petitioner, to Judge Gerald Weber of the United States District Court for the Western District of Pennsylvania.

Court accepts the argument that disparate treatment of pregnant employees is beyond the proscription of Title VII, employers will be free not only to deny benefits for pregnancy-related disabilities but also to fire pregnant employees without regard to their ability to work or to their records as experienced, loyal employees. Respondents have also summarized the history of other aspects of this litigation because they believe that their employer's new found reliance upon the so-called "cost defense" which it previously claimed it was unable to support should be reviewed against its consistent practice of asserting for appellate review facts or defenses upon which it never relied below.[5]

Because of the arguments made by Petitioner and its supporting *amici,* it is important to define precisely what Respondents do and do not claim. Contrary to the suggestion contained in the broad statement of the Question Presented in Petitioner's Brief, Respondents do not contend that Title VII requires all employers to provide

---

5. Illustrative of Petitioner's constantly shifting positions was its admission below that coverage for all complications arising from pregnancy is excluded from its income protection program. It now contends, with no support in the record, that complications are covered and that only "normal pregnancy" is excluded. This argument is dealt with *infra* at 28-29.

Similarly, Petitioner asserted at the oral argument on Respondents' motion for summary judgment that the Respondents' request for notice to class members was "purely to build up the amount of damages" and that there was "no reason whatsover for any notice to issue in this case." Transcript of Proceedings of October 31, 1973, p. 71. Thereafter, Petitioner unsuccessfully urged the court of appeals and this Court to reverse the class action judgment based upon the failure to provide class members with notice of the pendency of the action.

income protection plans or disability benefits for pregnancy or for all pregnancy-related disabilities. They do contend that absent a showing of a legally valid justification for exclusion, an employer who has a disability program which provides coverage and supplementary salary benefits for every disability with which a male may be afflicted is precluded by Title VII from excluding only pregnancy-related disabilities from that program. Although the fact may be obscured by the wide-ranging arguments of the Petitioner and its *amici,* many of whom are defendants in similar litigation, this case is limited to a context in which the Petitioner agreed that the case was ripe for summary judgment (A. 108)[6] and rejected the opportunity to justify any of the practices which were condemned by the trial and appellate courts. Although it may be tempting to view this case as one which must resolve all pregnancy-related Title VII issues for all employers and all employees for all time, it must be remembered that the case was decided in a narrow factual, legal and procedural context. The belated and unrelated factual arguments now raised by Petitioner and its *amici* have nothing to do with this case.

---

6. *See* also, Transcript of Proceedings of October 31, 1973, p. 75.

SUMMARY OF ARGUMENT

This case involves a question of statutory construction regarding the legality under Title VII of the Civil Rights Act of 1964 of the Petitioner's Income Protection Plan. Petitioner's plan affords benefits for all temporary disabilities except those related to pregnancy and childbirth, the disparate consequence of which adversely affects female workers in their employment opportunities. Petitioner concedes that Congress has power to regulate such benefit programs and that its Income Protection Plan is subject to the reach of Title VII.

Because this case was decided on a motion for summary judgment based upon undisputed facts and in the absence of defenses asserted by Petitioner, the only issue before this Court is whether Respondents demonstrated the existence of a *prima facie* case of sex discrimination under Title VII. During the ten year lifetime of Title VII, a single standard has evolved for establishing *prima facie* violations of the Act and demarcating the burden of proof between employers and employees. That standard requires the employee to demonstrate membership in a protected class and an adverse impact of a challenged employment practice upon that class. Here, the Respondents demonstrated that female employees are adversely affected by Petitioner's Income Protection Plan. Petitioner, however, when confronted with that showing, elected not to explain or justify the reasons for its practices.

The Equal Employment Opportunity Commission's Guidelines dealing with pregnancy-related employment practices also provide that the practice challenged herein is *prima facie* violative of Title VII. Although the Guidelines were not enacted until 1972, the Commission

had expressed the views contained therein as early as 1969, and those views were known to Congress when it amended Title VII in 1972. The Guidelines have been afforded deference by virtually every district court and court of appeals which has considered them. Their relevant provisions are substantively identical to HEW regulations which were submitted to and approved by Congress and also to other proposed agency regulations and guidelines.

Whether pregnancy-related employment practices, such as mandatory terminations of pregnant employees, mandatory maternity leaves which do not take into account an employee's ability to work and disparate treatment of pregnancy-related disabilities under temporary disability programs, can violate Title VII is not a new question to the courts. Numerous district courts and courts of appeals have considered the issue and reached results which are consistent with the instant decision. No court has concluded, in either a Title VII or a Fourteenth Amendment employment discrimination case, that such practices cannot constitute proscribed sex discrimination. *Geduldig v. Aiello,* 417 U.S. 484 (1974), the principal case relied upon by Petitioner, is factually, procedurally and legally inapposite.

ARGUMENT

I. Respondents Established A Prima Facie Violation Of Title VII With Respect To Terms, Conditions And Privileges Of Employment By Demonstrating Their Employer's Imposition Of A Contributory Disability Insurance Program To Which Employees Must Subscribe As A Condition Of Employment And Which, With The Exception Of Intentionally Self-Inflicted And War Time Disabilities, Provides Benefits For All Disabilities To Which Male Employees May Be Subject Without Providing Benefits For All Disabilities To Which Female Employees May Be Subjected.

At the core of this case are the interpretation of Title VII's proscription against sex discrimination and the question of whether pregnancy-related employment practices ever can fall within that proscription. Neither Petitioner nor any of its supporting *amici* contends that Congress is not free to regulate the conduct complained of or that this case involves anything other than a question of statutory construction. If Title VII cannot apply to pregnancy-related employment practices as a matter of law, the decision of the court of appeals must be reversed. If, however, there are any circumstances under which the reach of Title VII can extend to such practices, the record in this case mandates affirmance.

A. Respondents Carried Their Title VII Burden of Showing Membership in a Protected Class and the Adverse Effect of the Challenged Employment Practice on That Class, and Thereby Shifted to Their Employer the Burden of Proving Justification.

Congress enacted Title VII to assure equality of employment opportunities, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. *Albemarle Paper Co. v. Moody*, 43 U.S.L.W. 4880 (U.S. June 25, 1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Act prohibits employment practices which have either the purpose or effect of discriminating on the basis of a protected status without regard to motive or intent. *Moody, supra; Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973); *Griggs, supra*. A Title VII plaintiff need show only membership in a protected class and the adverse effect of an employment practice on that class in order to shift to the employer the burden of showing a legitimate, non-discriminatory reason for the practice and a manifest relationship between the practice and the employment in question. *Moody, supra; Green, supra; Griggs, supra*. Only if the employer meets that burden must the Title VII plaintiff come forward to show that the stated justification is actually a pretext for prohibited discrimination. *Moody, supra; Green, supra*. This standard, which recognizes the inherent difficulty in demonstrating discrimination which is often subtle, covert and facially neutral, applies to Title VII sex discrimination cases. *Edwin L. Wiegand Co. v. Jurinko*, 414 U.S. 970 (1973) *(per curiam)*. Respondents carried

their initial burden. Their employer, when confronted with the burden of justifying its practice, did nothing.

Petitioner's Income Protection Plan deprives women of employment opportunities. Only women suffer the deprivation of income during the first seven (7) days of a long-term illness which requires the care and treatment of a doctor (A. 88-89), and only a woman must depend upon her supervisor's discretion to consider the first five (5) days of an absence from work as compensable under Petitioner's "short-term" absence policy. *Id.* Even then, that discretion may not be exercised unless the woman has seen a doctor, a condition which is never imposed upon male employees. *Id.* Only women are denied supplementary salary benefits. Only women are deprived of the opportunity to resume full-time employment with no loss of status following a long-term disability without regard to the cause of the disability. By providing income protection benefits to disabled employees until age 65, Petitioner provides the opportunity to be free from the inability to resume or find new employment and from the financial ruin which often accompanies long-term disability. Only the female disabled by pregnancy or childbirth or complications resulting therefrom is deprived of those opportunities. The effect of the deprivation of benefits under Petitioner's Income Protection Plan is aggravated by the mandatory return to work date which applies only to pregnancy-related disabilities and which is inextricably linked to the Income Protection Plan. Not only is the disabled female employee afforded no income protection to tide her over a temporary disability, but she is also fired if that disability does not terminate soon enough to enable her to return to work within an arbitrary period of time which is applied to no other disability. The impact is aggravated even further by the fact that Petitioner's health insurance plan provides coverage for children of employees working for the Company at the time of the birth of a child, but excludes from coverage the children of women on maternity leaves at the time of the child's birth, a practice which applies to and adversely affects only female employees (A. 145).

Seizing upon footnote 20 in *Geduldig v. Aiello,* 417 U.S. 484 (1974), discussed *infra* at Part IC, Petitioner argues in effect that its plan distinguishes not between men and women but between "pregnant females and non-pregnant persons." It is obvious, however, that each non-pregnant female person is potentially a pregnant female although, of course, no non-pregnant male person is. Approximately 84% of the married women in the United States experience pregnancy and its accompanying disability at least once, and a married woman in the United States is pregnant an average of 2½ times in her life.[7] Consequently, each of the Petitioner's female employees, whether she ever becomes pregnant or not, is potentially subject to the adverse effects of the Income Protection Plan and Petitioner's other pregnancy-related practices.

Working women, like men, become disabled for various reasons. All of the Petitioner's disability benefits, with their concommitant opportunities for continuing employment and avoiding financial ruin, are available

---

7. U. S. Department of Commerce, Bureau of Census, *1970 Census of Population*: detailed characteristics P.C. (1)—D. 1, United States, Summary Table 111. 1-671 (1973). These statistics are derived from 1970 Bureau of the Census data on the number of children born and do not take into account pregnancies which did not result in the birth of a child, those resulting in multiple births, or those of women who have never been married.

to all male employees but not to all female employees. Unless the Petitioner is permitted to classify certain positions as "male" and "female" as the trial and appellate courts found that it did, it must be presumed that men and women will compete with one another for positions and opportunities within the Company. It is precisely that kind of competition which *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) *(per curiam)*, protects. In asserting that their practices do not discriminate against similarly situated members of the opposite sex, Petitioner and its *amici* take far too narrow a view. First, male and female employees of like qualifications are indeed "similarly situated" in the employment relationship—at least until the female becomes pregnant. Then, the policies which Petitioner concedes are based upon a sexual characteristic work their disparate consequences. As the court pointed out in *Gilbert v. General Electric Co.*, 375 F.Supp. 367 (E.D. Va. 1974), *aff'd*, —— F.2d ——, 10 FEP Cases 1201 (4th Cir. 1975):

> . . . it is a claim of disparate treatment of persons, otherwise similarly situated, on the basis of a particular condition, the peculiarity of which is both irrelevant to the purpose of the company program and ineluctably sex linked. 375 F.Supp. 367, 385.

The suggestion that the practice should be saved because it adversely affects only a subgroup of women directly contravenes the policy established in *Phillips*. Acceptance of that suggestion can operate to revitalize all of the mandatory maternity leave and termination policies which likewise affect only women and which have been condemned consistently under Title VII. *See, e.g., Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651 (8th Cir. 1975); *Singer v. Mahoning County Board of Mental Retardation*, 379 F.Supp. 986 (N.D.Ohio 1974), *aff'd on other grounds*, —— F.2d ——, 10 EPD ¶10,287 (6th Cir. 1975) *(per curiam); Vineyard v. Hollister Elementary School District*, 64 F.R.D. 580 (N.D.Cal. 1974).

B. Although Approval of the Equal Employment Opportunity Commission's Guidelines Is Not Crucial to the Demonstration of a *Prima Facie* Case, the Guidelines Are Nevertheless Entitled to Judicial Deference.

Although reliance upon and deference to the Equal Employment Opportunity Commission's Guidelines which deal with pregnancy-related employment practices are unnecessary to sustain the decision of the court of appeals, *Gilbert v. General Electric Co.*, ——F. 2d——, 10 FEP Cases 1201 (4th Cir. 1975), the Guidelines are entitled to judicial deference and demonstrate a *prima facie* violation of Title VII.[8]

In adopting a shotgun approach intended to undermine the Guidelines with which Petitioner's practices directly conflict, Petitioner and its supporting *amici* overlook or misconstrue those decisions of this Court which deal with the Guidelines and, consequently, fail to recognize the very narrow range within which such interpretations will not be afforded deference. This Court first put its imprimatur of "great deference" upon the Commission's interpretive Guidelines in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and thereafter in *Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86

---

8. The applicable Guidelines are reproduced in the Appendix at 201-03.

(1973), and *Albemarle Paper Co. v. Moody,* 43 U.S.L.W. 4880 (U.S. June 25, 1975). In *Moody,* the Court recognized that the Guidelines "are not administrative 'regulations' promulgated pursuant to formal procedures established by the Congress," 43 U.S.L.W. 4880, 4888, but nevertheless afforded them great deference as the "administrative interpretation of the Act by the enforcing agency." *Id.*[9]

Espinoza, which is instructive in several respects, supports Wetzel and Ross' position and deference to the Guidelines. In *Espinoza,* too, the Commission, through its General Counsel, earlier announced an interpretation inconsistent with its later Guideline. This Court never-

9. This recognition in *Moody* impliedly rejects the Petitioner's contention that the Commission's failure to comply with the formal procedures of the Administrative Procedure Act mandates rejection of the Guidelines. In *Espinoza, supra,* this Court reaffirmed the principle that the Guidelines are entitled to great deference except for those unusual circumstances where "application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question" or "where there are 'compelling indications that it is wrong.' " 414 U.S. 86, 94-95.

Even after this Court's decision in *Geduldig v. Aiello,* 417 U.S. 484 (1974), discussed *infra* at Part IC, every United States Court of Appeals which considered the Commission's Guidelines dealing with pregnancy-related employment practices in a Title VII case afforded them great deference. *Satty v. Nashville Gas Co.,* —— F.2d ——, 11 FEP Cases 1 (6th Cir. 1975); *Hutchison v. Lake Oswego School District,* —— F.2d ——, 11 FEP Cases 161 (9th Cir. 1975); *Gilbert v. General Electric Co.,* —— F.2d ——, 10 FEP Cases 1201 (4th Cir. 1975); *Communications Workers v. American Telephone & Telegraph Co.,* 513 F.2d 1024 (2d Cir. 1975), *petition for cert. docketed at* No. 74-1601 (June 19, 1975); *Holthaus v. Compton & Sons, Inc.,* 514 F.2d 651 (8th Cir. 1975).

theless concluded that the "more recent interpretation of the statute in the guideline relied on . . . is no doubt entitled to great deference." 414 U.S. 86, 94. The Guideline was not applied in that case, however, because there was no indication in the record that the defendant's challenged policy had the purpose or effect of discriminating against persons of Mexican national origin as alleged, and because the plain language of the statute and its legislative history obviously disclosed that Congress did not intend the term "national origin" to include citizenship requirements. The Court found persuasive the fact that the Civil Service Commission and Congress also had embraced a practice of requiring citizenship of federal employees. No such history or Congressional action exists in the instant case, however. Just as Congress must have been aware of the Civil Service Commission's practice in *Espinoza,* so, too, must it have been aware of the Civil Service Commission's requirement that all agencies provide the same right to use accrued sick leave for pregnancy-related absences as is provided for absences from any other disability.[10] In addition, as early as 1946, Congress enacted a temporary disability program which provided benefits for pregnancy-related disabilities.[11]

Although the legislative history dealing with the amendment adding the word "sex" to Title VII is meager, it reveals no "obvious Congressional intent" not to reach the employment practice in question. By the time of the 1972 amendments to Title VII, Congress presumably was aware that as long ago as June, 1969,

10. 5 C.F.R. §630.401(b).

11. Railroad Unemployment Insurance Act, 45 U.S.C. §351(k)(2).

the EEOC had adopted the views which were ultimately enunciated in the interpretations relied upon to challenge Petitioner's employment practices.[12]

It is apparent that the Commission's attitude toward pregnancy-related issues has undergone the same evolutionary process as have Congress', society's and the courts' views of the kinds of conduct which constitute employment discrimination. *See, e.g., Rogers v. EEOC,* 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1972). The Senate Report accompanying the 1972 Amendments to Title VII emphasizes Congress' concern with the problem of sex discrimination:

> While some have looked at the entire issue of women's rights as a frivolous divertissement, this Committee believes that discrimination against women is no less serious than other prohibited forms of discrimination, and that it is to be accorded the same degree of concern given to any type of similarly unlawful conduct. As a further point, recent studies have shown that there is a close correlation between discrimination based on sex and racial discrimination, and that both possess similar characteristics. Both categories involve large, natural classes, membership in which is beyond the individual's control; both involve highly visible characteristics on which it has been easy to draw gross,

12. EEOC Decision, Case No. LA 68-4-538E (June 16, 1969); EEOC Decision No. 71-562 (December 4, 1970); EEOC Decision No. 71-1474 (March 19, 1971). If, as Petitioner and its supporting *amici* suggest, it can be said that Congress was aware of and acquiesced in any position of the Commission at the time of the 1972 amendments, that position is reflected in these published decisions.

stereotypical distinctions. The arguments justifying different treatment of the sexes were also historically used to justify different treatment of the races.

While it is true that the extreme aspects of sex-discrimination as it existed in the early part of the twentieth century have been dispelled, and women have now been granted the right to vote and may serve on juries, their status in employment is still subject to blatant discrimination. In a series of decisions in recent years, the courts have voided employment practices and policies which discriminate on the basis of sex, and have, accordingly, set the necessary legal precedents for dealing with this form of discrimination. However, despite the effort by the courts and EEOC, discrimination against women continues to be widespread; and is regarded by many as either morally or physiologically justifiable. S.Rep. No. 92-415, 92d Cong., 1st Sess. 7-8 (1971) (Footnotes omitted.)

Furthermore, the recently adopted regulations of the Department of Health, Education, and Welfare implementing the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 *et seq.,* relating to the prohibition of sex discrimination in federally assisted education programs, were transmitted to Congress pursuant to Section 431(d)(1) of the General Education Provisions Act, as amended by Section 509(a)(2) of the Education Amendments of 1974, 20 U.S.C. §1232(d)(1). It is of compelling significance that those regulations were not altered by Congress. They became effective on July 21, 1975, and, therefore, reflect current Congressional approval. They provide, in relevant part, as follows:

> (c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, *payment of disability income,* accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment. 45 C.F.R. §86.57, 40 Fed.Reg. 24144 (June 4, 1975) (Emphasis supplied.)

The Office of Federal Contract Compliance and the United States Department of the Treasury also have proposed guidelines and interpretations which require pregnancy-related disabilities to be treated as any other temporary disability for all job related purposes. *See,* respectively, 38 Fed.Reg. 35336 (December 17, 1973), and 40 Fed.Reg. 29074 (July 24, 1975). Just as interpretations of state statutes do not control the construction of federal law although they may be indicative of a general understanding of definitional terms, *Espinoza, supra,* 414 U.S. 86, 88 n.2, so, too, do these administrative views indicate a general understanding that the practice challenged in this litigation constitutes sex discrimination.[13]

---

13. Similarly, numerous state court decisions have interpreted state fair employment practice laws' bans against sex discrimination to prohibit practices of the type challenged herein: *Board of Education v. State Division of Human Rights,* 42 App.Div.2d 854, 346 N.Y.S.2d 843 (1973), *aff'd,* 35 N.Y.2d 675, 360 N.Y.S.2d 887 (1974); *Board of Education v. New York State Division of Human Rights,* 42 App.Div.2d 49, 345 N.Y.S.2d 93 (1973), *aff'd,* 35 N.Y.2d 673, 360 N.Y.S.2d

Petitioner's reliance upon the legislative history of the Equal Rights Amendment to the Constitution of the United States is misplaced. The ERA legislative history which indicates that it would not be violative of the Amendment for a *state* to enact *legislation* which provides for special treatment of pregnancy refers only to a situation in which a state would confer upon one sex a benefit which could not be conferred upon members of the other and in which neither sex would suffer any detriment. It does not refer to a situation where the disparate treatment works to the detriment of one sex.[14]

---

887 (1974); *Board of Education v. New York State Division of Human Rights,* 42 App.Div.2d 600, 345 N.Y.S.2d 101 (1973), *aff'd,* 35 N.Y.2d 677, 360 N.Y.S. 2d 888 (1974); *Cedar Rapids Community School District v. Parr,* —— Iowa ——, 227 N.W.2d 486 (1975); *Cerra v. East Stroudsburg Area School District,* 450 Pa. 207, 299 A.2d 277 (1973); *Union Free School District No. 6 v. New York State Human Rights Appeal Board,* 35 N.Y.2d 37, 362 N.Y.S.2d 139 (1974). *Contra, Ray-O-Vac v. Wisconsin Department of Industry, Labor & Human Relations,* 8 EPD ¶9656 (Wis. Cir. Ct. 1974), *appeal pending in* Wis. Sup. Ct.

14. As one commentator has noted:

> . . . the matter of *unfavorable* treatment of a socially beneficial function like childbearing was not before Congress. The reports and debates on the amendment repeatedly stress that Congress' concern was with retaining laws which by their nature applied to one sex only but which also reflected sound social policies, not sexual stereotypes. Because its attention was focused on preserving beneficial legislation, there is no evidence that Congress really considered the negative implications of excluding single-sex characteristics from its equal rights formulation. . . . Since the E.R.A. was clearly remedial, it is unlikely that Congress would intentionally approve a rationale that could then be utilized to achieve exactly what the E.R.A. was

C. EXISTING DECISIONAL LAW DEMONSTRATES THAT RESPONDENTS HAVE ESTABLISHED A *Prima Facie* VIOLATION OF TITLE VII.

Petitioner relies upon its analysis of footnote 20 to the majority opinion in *Geduldig v. Aiello,* 417 U.S. 484 (1974), for its principal attack on the decision below. Conspicuously absent from that analysis is any recognition of the narrow holding in that case, the post-*Aiello* decisions of five other United States Courts of Appeals or of the different factual and procedural contexts and benefit plans in *Aiello.*

Aiello dealt only with a constitutional attack under the Equal Protection Clause on a *legislatively* created social welfare program for private employees in which a differentiation was made between pregnancy-related and other disabilities. The majority of the Court applied a certain standard in testing legislation under the Equal Protection Clause and held, in essence, that the classification was "rationally supportable." *Aiello, supra,* 417 U.S. 484, 495. Nothing more was required to sustain the legislation against the Equal Protection assault. Footnote 20, which has been recognized uniformly as a response to the dissenting Justices who would have applied a stricter standard of scrutiny, neither stated nor suggested that a disability program which excludes pregnancy-related disabilities *cannot* constitute sex discrimination. The footnote reflects a finding of fact, based on the record before the Court, that the California

---

designed to end: distinctions harmful to a protected class. *Comment, Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination,* 75 Columbia L.R. 441, 473-4 (1975) (Footnote omitted.)

program did not exclude anyone from eligibility because of gender, but rather that it removed one physical condition from the list of compensable disabilities. Indeed, the majority recognized that distinctions involving pregnancy can constitute pretextual efforts to effect invidious discrimination in violation of the Fourteenth Amendment. The Court found a lack of identity between the excluded disability and "gender as such under this insurance program." *Aiello, supra,* 417 U.S. 484, 497 n. 20.

That finding, as limited to the record before the Court, is consistent with Respondents' Title VII analysis of the shifting burdens of proof in this case. Assuming, *arguendo,* similar Title VII and Fourteenth Amendment substantive standards, the plaintiff in *Aiello* carried her initial burden by demonstrating that the state's plan had an adverse impact on women. Then, the defendants, consistent with *Albemarle Paper Co. v. Moody,* 43 U.S.L.W. 4880 (U.S. June 25, 1975) and *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), articulated a legitimate, non-discriminatory reason for the exclusion of certain benefits from the plan. Thereafter, when the burden shifted back to the plaintiff to introduce evidence of a pretext, the plaintiff failed to meet her burden and the court found a lack of identity between the excluded disability and gender *under that insurance program.* In contrast, when the plaintiffs in this case demonstrated the impact of Petitioner's pregnancy-related practices upon female employees, Petitioner did nothing.

As indicated above, five other United States Courts of Appeals have considered pregnancy-related employment practices in Title VII contexts subsequent to *Aiello*.[15] Each of the four decisions which dealt with *Aiello* directly concurred with the Third Circuit's conclusion that Title VII cases involve statutory interpretation rather than constitutional analysis. Each deferred to the EEOC's Guidelines. Each rejected Petitioner's view that footnote 20 requires Title VII plaintiffs to carry a heavy initial burden of proving that distinctions involving pregnancy are mere pretexts. Each court,

15. *Satty v. Nashville Gas Co.*, —— F.2d ——, 11 FEP Cases 1 (6th Cir. 1975); *Hutchison v. Lake Oswego School District*, —— F.2d ——, 11 FEP Cases 161 (9th Cir. 1975); *Gilbert v. General Electric Co.*, —— F.2d ——, 10 FEP Cases 1201 (4th Cir. 1975); *Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651 (8th Cir. 1975); *Communications Workers v. American Telephone & Telegraph Co.*, 513 F.2d 1024 (2d Cir. 1975), *petition for cert. docketed at* No. 74-1601 (June 19, 1975). *Accord, Women In City Government United v. City of New York*, —— F.2d —— (2d Cir., April 14, 1975) *(per curiam), petitions for cert. docketed at* Nos. 75-70, 71 (July 12, 1975). Only *Holthaus* did not discuss *Aiello* directly. It did, however, rely upon the instant decision and analyze the shifting burdens of proof in the same manner as Respondents do herein. Clearly, it rejected the Petitioner's present assertion concerning the effect of *Aiello*. *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) *(en banc)*, relied upon by Petitioner, also supports the Third Circuit's view in concluding that Title VII's ban against sex discrimination extends to fundamental rights such as the right to marry or bear children.

Similar conclusions were reached by district courts in the following post-*Aiello* cases: *Liss v. School District*, 10 EPD ¶10,312 (E.D. Mo. 1975), *appeals docketed at* Nos. 75-1440, 1447 (8th Cir.); *Sale v. Waverly-Shell Rock Board of Education*, 390 F.Supp. 784 (N.D. Iowa

relying on the record before it, struck the challenged practice. Each rejected, at least impliedly, the argument which presupposes that the lawful scope of employment policies under Title VII is coextensive with the Fourteenth Amendment. As the court stated in *Satty, supra*, "the better approach permits Title VII under the commerce clause to extend beyond the reach of the Equal Protection clause." 11 FEP Cases 1, 4. That conclusion is consistent with this Court's earlier ruling that "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-9 (1974).

1975), *leave to appeal denied*, Misc. No. 75-8088 (8th Cir., January 31, 1975); *Zichy v. City of Philadelphia*, 392 F.Supp. 338 (E.D. Pa. 1975).

Decisions were nearly unanimous before *Aiello* also. *See, e.g., Dessenberg v. American Metal Forming Co.*, 8 EPD ¶9575 (N.D. Ohio 1973); *Doe v. Osteopathic Hospital*, 333 F.Supp. 1357 (D.Kan. 1971); *Farkas v. South Western City School District*, 8 EPD ¶9619 (S.D. Ohio 1974), *aff'd without opinion*, 506 F.2d 1400 (6th Cir. 1974); *Lillo v. Plymouth Local Board of Education*, 8 EPD ¶9510 (N.D. Ohio 1973); *Singer v. Mahoning County Board of Mental Retardation*, 379 F.Supp. 986 (N.D. Ohio 1974), *aff'd on other grounds*, —— F.2d ——, 10 EPD ¶10,287 (6th Cir. 1975); *Vick v. Texas Employment Commission*, 6 EPD ¶8933 (S.D.Tex. 1973), *aff'd in part, rev'd in part on other grounds*, 514 F.2d 734 (5th Cir. 1975). Even *Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238 (N.D. Ga. 1973), relied upon by Petitioner, is consistent with the instant decision. The court held that arbitrarily fixing a time when a pregnant woman must terminate her employment constitutes proscribed sex discrimination under Title VII. A contrary result was reached with respect to sick benefits because of the court's conclusion concerning the definition of the word "sick" within the meaning of the particular employer's benefit plan.

The Court of Appeals for the Second Circuit cogently demonstrated the fallacy of placing too much reliance upon footnote 20. The court reasoned as follows:

> Footnote 20 . . . is in essence a refutation of the dissenting view as to the Equal Protection standards of judicial scrutiny applicable to the California legislative classification before the Court. It rejects the dissenting view that the California classification should be treated like the legislative classifications in *Reed, supra,* and *Frontiero, supra.* Stating that not '*every legislative classification* concerning pregnancy is a sex-based classification . . . ,' it goes on to say that '[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, *lawmakers are constitutionally free* to include or exclude pregnancy *from the coverage of legislation such as this* on any reasonable basis . . .' . . . . Thus, footnote 20 deals with the constitutional validity of legislative classifications under the Equal Protection Clause, the standards of judicial scrutiny to be applied in making such a determination, and nothing more. Moreover, it does so in the context of the extensive record before the Court as to the operation and effects of the particular statutory insurance program it was considering and the considerations which led the California legislature to adopt it.

Nowhere, either in the body of the majority opinion in *Aiello* or in the footnote, is there any reference to the provisions of Title VII or the EEOC guidelines designed to prohibit the disparate treatment of pregnancy disabilities in the employment context. *Communications Workers, supra,* 513 F.2d 1024, 1029-30.

The court also pointed to Mr. Justice Stewart's earlier note in the majority opinion in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974), where he recognized that Title VII was inapplicable to the Fourteenth Amendment cases then before the Court. Mr. Justice Stewart then observed:

> Shortly thereafter, the Equal Employment Opportunity Commission promulgated guidelines providing that a mandatory leave or termination policy for pregnant women *presumptively* violates Title VII. 29 C.F.R. §1604.10, 37 Fed. Reg. 6837. While the statutory amendments and the administrative regulations are of course inapplicable to the cases now before us, they will affect like suits in the future. 414 U.S. 632, 639 n. 8. (Emphasis added.)

As the court aptly concluded in *Communications Workers, supra,* "It can scarcely be thought that Mr. Justice Stewart in *Aiello sub silentio* invalidated the guidelines which he had said only five months before in *LaFleur* would, in the future, affect suits involving pregnancy-related employment practices." 513 F.2d 1024, 1031 n. 11.

Furthermore, *Aiello* is factually and procedurally distinguishable from the instant case. In *Aiello,* only one aspect of California's social welfare scheme was under attack. Here, numerous aspects of Petitioner's employment practices, both pregnancy-related and otherwise, have been found to be violative of Title VII. That finding alone would support an inference of an intent to dis-

criminate in other areas. *Keyes v. School District No. 1,* 413 U.S. 189, 207-8 (1973).

As the Court of Appeals for the Second Circuit recognized, *Aiello* was decided upon an extensive record in a case in which defenses were raised, briefed and argued in a timely fashion. It did not involve the state of California in its capacity as an employer and was not an employment discrimination case. It involved only the state's social welfare program. Only so-called "normal" pregnancy was excluded from the scope of the plan by the time of this Court's decision. Unlike the plan now before the Court, disabling complications were covered. Petitioner concedes that a disability income plan is "open to attack insofar as it may exclude abnormal complications encountered during pregnancy."[16] It now asserts for the first time, however, that its exclusion of "any cause related to pregnancy" has never been defined, was never raised by Respondents and does not exclude complications in any event.[17] That contention contradicts the entire record. First, the limitation which excludes "disability due to pregnancy or any cause related to pregnancy" is unambiguous. Second, Petitioner's Manager of Personnel Services, who is responsible for the administration of the Income Protection Plan, testified that the plan does not cover disability "related to" pregnancy (A. 42-43). When he made numerous sworn corrections to his deposition testimony on November 27, 1972, he did not alter the testimony concerning the exclusion of pregnancy-related disabilities. Finally, the statement that the court of appeals "misconstrued the plan's coverage by assuming that the plan 'would

16. Brief for Petitioner, p. 16 n. 26.

17. *Id.*

not cover a disability suffered by a pregnant woman but would have covered the disability had the woman not been pregnant' "[18] is erroneous and unfair to that court. At the argument before the court of appeals on October 30, 1974, Mr. Grove, Petitioner's counsel, unequivocally represented that pregnancy and childbirth-related complications such as "blood poisoning," "hypertension," "phlebitis" and "post-partum melancholy" would *not* be covered.[19]

Petitioner has failed to tender any justification for excluding pregnancy-related complications and has never suggested that such complications are actuarily dissimilar to other covered risks. Consequently, the exclusion of such complications must be deemed violative of Title VII in the context of this case. Similarly, Petitioner's practice of denying supplementary salary benefits to females disabled by pregnancy and childbirth has never been justified actuarily or otherwise, discriminates on the basis of sex, and must also be condemned under Title VII.

18. *Id.*

19. Such disabilities were covered in *Aiello, supra,* 417 U.S. 484, 490 n. 15. Because of the surprising contention now set forth in the Brief for Petitioner, Respondents listened to the court of appeals' recording of the oral argument. Although no transcript was prepared, it can be noted that the colloquy between the court and Mr. Grove concerning this issue begins at foot 1276 on side two of tape number 175.

II. To The Extent That Defenses May Exist To Claims Similar To Those Asserted Herein, None Were Raised By Or Available To The Petitioner.

Although the record below was voluminous, the courts below did not have to resolve factual disputes or draw any factual inferences. With respect to the pregnancy-related issues, Petitioner asserted no affirmative defenses and produced no counter-affidavits or statistical information. It simply asserted the lawfulness of its policies and stipulated that the issues were ripe for summary judgment. Notwithstanding Petitioner's unique ability to gather and provide available statistical, cost and actuarial data by virtue of its activities as a national insurance underwriter, it declined the trial court's request for such information, and, instead, consistently maintained that there was no reliable basis upon which to estimate the cost of providing pregnancy-related disability benefits (A. 194). Not until after the entry of judgment did Petitioner and its supporting *amici* rally to present the statistics which the Company previously asserted could neither be provided nor relied upon.[20] A ruling on a motion for summary judgment and the review of a decision on such a motion are to be made upon the record the parties have actually presented to the trial court and not on one potentially possible. *Shafer v. Reo Motors, Inc.*, 205 F.2d 685, 688 (3rd Cir. 1953). *See* also, *Hutchison v. Lake Oswego School District*, —— F.2d ——, 11 FEP Cases 161, 164 (9th Cir. 1975). Just as it was unnecessary in the context of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), to decide whether test-

20. Although the *amicus* Chamber of Commerce of the United States of America urged the trial court to consider a cost argument, Petitioner neither relied upon nor adopted that position.

ing requirements which take into account capability for succeeding positions might be utilized upon a proper showing by the employer, it is unnecessary to decide whether the Petitioner's recently proffered arguments constitute valid defenses. *Griggs, supra,* 401 U.S. 424, 432. Nevertheless, Respondents will discuss the Petitioner's contentions briefly.

The *bona fide* occupational qualification standard set forth in 42 U.S.C. §2000e-2(e) is applicable only to hiring and firing charges and, of course, was never asserted herein. In presenting various statistical information, the forces of industry presumably are relying upon the judicially defined defense of "business necessity" in a cost context. The defense applies to facially neutral employment practices which have disparate effects. *Griggs, supra; Moody v. Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973), *vacated,* 43 U.S.L.W. 4880 (U.S. June 25, 1975); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied,* 406 U. S. 906 (1972); *Head v. Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973). Additionally, the burden is on the employer to plead and prove business necessity. *Griggs, supra.*

An alleged increased cost of doing business can no more be a defense to a Title VII charge of sex discrimination in employment than to a Title II charge of race discrimination in public accommodations. *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 260 (1964). As one district court pointed out after the presentation of voluminous evidence of cost in a Title VII pregnancy practice case:

> Primary, of course, is the principle that business necessity constitutes a valid defense only to a

situation where the alleged discrimination arises from a policy neutral on its face, and in its intent. The instant case does not fall in this category. Additionally, it is doubtful in the first instance if cost alone would constitute a proper defense. See Robinson v. Lorillard Corporation, 444 F.2d 791, 799 f.n.8 (4th Cir. 1971). The business necessity rationale is premised on a policy of justification by virtue of a showing that the suspect conduct is necessary to the safe and efficient operation of the business. Jones v. Lee Way Motor Freight, 431 F.2d 245 (10th Cir. 1970). As one court has expressed it, 'Necessity connotes an irresistible demand.' United States v. Bethlehem Steel Corp., 446 F.2d 562 (2d Cir. 1971). No such situation exists here.

* * *

In the instant case, the Company chose to negotiate a contract which they knew would result in certain benefits to their employees and deliberately chose to preclude benefits to employees who became pregnant. They cannot now justify such discrimination by simply contending that the cost would be high. In addition, it is obvious that the cost, if prohibitive or destructive of defendant's business, may be reduced in any number of alternative ways, as suggested in the briefs. Simply stated, there is no evidence before the Court to render viable a defense of business necessity. *Gilbert v. General Electric Co.*, 375 F.Supp. 367, 382 (E.D. Va. 1974), *aff'd*, —— F.2d ——, 10 FEP Cases 1201 (4th Cir. 1975).

Furthermore, Petitioner's unsupported contentions concerning costs must be viewed in light of its failure

to present any evidence concerning the cost of its plan[21] and its failure to provide *any* coverage for pregnancy-related disabilities whatsoever. Liberty Mutual suggests that because of allegedly prohibitive costs, industry consistently excludes pregnancy-related disabilities from plans for income maintenance during temporary disabilities. That suggestion is inaccurate. In fact, for more than 25 years, more than half of the major corporations with temporary disability plans have included benefits

---

21. The specific data proffered by the Petitioner and its *amici* is irrelevant and valueless. It is not part of the record below, and none of it even relates to this case. Acceptance of that data would result in this Court's applying another employer's *factual* defenses to an employer who never raised them. It would also enable the *amici* to have the factual issues in their own pending litigation resolved by this tribunal. Even if one were to conclude that the *amici's* statistics might have some remote connection to this litigation, they would not justify a reversal of the district court's decision. Assuming, *arguendo*, that AT&T's estimate that inclusion of whatever it means by "normal pregnancy" would have increased costs within its system-wide disability program by $19,036,300.00 for 1971-1972 is not corrupted by its arbitrary use of an eight week benefit period or otherwise, it must be recognized that the increased cost would have covered a work force of approximately 955,752 eligible employees, a fact which is glaringly absent from that employer's *"amicus"* brief to this Court. *See,* Brief of American Telephone & Telegraph Company as Amicus Curiae, p. 2 n.1, *Wetzel v. Liberty Mutual Insurance Co.*, 511 F.2d 199 (3rd Cir. 1975). Applying the resulting annual *per capita* cost of less than $20.00 to the Petitioner's Income Protection Plan and recognizing that approximately one-third of the cost is born by the employees, the resulting cost to the Company in this case would be approximately $.25 per week per employee. Whatever the effect of AT&T's experience may be, it must be left for another tribunal to determine upon another record.

for six or eight weeks for disabilities arising from childbirth or a complication of pregnancy. About 95% of the cases involve disability which does not exceed six weeks. A 1972 Prentice Hall survey showed that of the companies which responded to the survey and provided sick pay, 54% covered employees disabled as a result of pregnancy.[22] Thus, the meat packing companies, Armour and Swift, and related food industries, e.g., Campbell Soup, pay for a maximum of 8 weeks for disability due to pregnancy. The entire auto industry, steel and related can industry and part of the electrical industry pay up to 6 weeks.

The minimal data which Petitioner proffered to the court of appeals in its post-judgment Motion for Leave to Present Background Statistics (A. 188-91) is unenlightening. Included within the figures supplied for the 31-33 month period ending July 31, 1973, is a period of approximately one year during which the Company fired women simply for being pregnant. Nowhere does the Company explain the effect of these involuntary terminations upon its "average" monthly figures. Nor does it

---

22. Prentice Hall, Personnel Management, Policies and Practices, Report Bulletin 25, ¶230, p. 459 (June 6, 1972).

For many years the U.S. Department of Labor, Bureau of Labor Statistics, had issued periodically the *Digest of Health and Insurance Plans*. The 1971 edition (GPO 1972), Vol. II, lists on the pages indicated the following plans as paying temporary disability benefits for disabilities arising out of pregnancy: Aluminum Co. of America, 6 weeks, p. 1; American Can Co., 6 weeks, p. 7; American Seating Co., 6 weeks, p. 9; American Standard, Inc., 6 weeks, p. 11; Amstar Corp., 6 weeks, p. 15; Armour & Co., 8 weeks, p. 17; Armstrong Cork Co., 6 weeks, p. 19; Bethlehem Steel, 6 weeks, p. 21; Borden, Inc., 6 weeks, p. 23; Brewers Board of Trade, 26 weeks,

relate any of the data to its own business needs or to the actual cost of its Income Protection Plan. Instead, it as-

---

p. 25; Campbell Soup Co., 8 weeks, p. 31; Caterpillar Tractor Co., 6 weeks, p. 35; Chase Brass & Copper Co., Inc., 6 weeks, p. 41; Cluett, Peabody & Co., Inc., 6 weeks, p. 49; Cone Mills, 6 weeks, p. 53; Construction Ind., Painter's District Council 9, 13 weeks, p. 61; Continental Can Co., 6 weeks, p. 63; Crown Zellerbach, 6 weeks, p. 67; Deere & Co., 6 weeks, p. 69; Distillery Industry, 6 weeks, p. 73; Dow Chemical, 6 weeks, p. 79; Retail Drug Industries & Hospitals, 6 weeks, p. 83; E. I. DuPont de Nemours, 6 weeks, p. 85; Firestone Tire & Rubber Co., 6 weeks, p. 87; FMC Corp., 6 weeks, p. 93; Ford Motor Co., 6 weeks, p. 97; Furniture Industry, 6 weeks, p. 101; General Motors, 6 weeks, p. 111; B. F. Goodrich Co., 6 weeks, p. 117; Greyhound Corp., 6 weeks, p. 122; Hotel Ass'n of N.Y.C., 6 weeks, p. 125; Interco, Inc., The Florsheim Shoe Co., 6 weeks, p. 135; Int'l Harvester Co., 6 weeks, p. 141; Int'l Paper Co., 6 weeks, p. 147; Jewelry Manufacturers Ass'n, 6 weeks, p. 151; Johnson & Johnson, 8 weeks, p. 153; Kennecott Copper, 6 weeks, p. 155; LTV Aerospace Corp., 6 weeks, p. 167; Luggage & Leather Goods Industry, 6 weeks, p. 171; Maritime Ind., 6 weeks, p. 177; Mass. Leather Mfrs. Ass'n, 6 weeks, p. 181; Metalworking & Repair Services, 6 weeks, p. 187; Nabisco, Inc., 6 weeks, p. 201; Nat'l Auto Transporters Ass'n, 6 weeks, p. 203; Nat'l Steel Corp., 6 weeks, p. 205; N.Y. Shipping Ass'n, Inc., 6 weeks, p. 207; North American Rockwell Corp., 6 weeks, p. 211; Northwest Forest Products Ass'n, 6 weeks, p. 215; Owens-Illinois, 6 weeks, p. 217; Pacific Maritime Ass'n, 6 weeks, p. 221; Philip Morris, Inc., 6 weeks, p. 233; Printing Industry-Lithographers, 6 weeks, p. 239; Pullman, Inc., 6 weeks, p. 245; RCA, 8 weeks, p. 251; Retail Trade Industry, 20 weeks, p. 257; Retail, Wholesale & Warehouse Industries, 6 weeks, p. 247; Sperry-Rand, 6 weeks, p. 265; Swift & Co., 8 weeks, p. 277; Trucking Industry, 6 weeks, p. 283; TRW, Inc., 6 weeks, p. 285; Uniroyal, Inc., 6 weeks, p. 291; United Air Lines, Inc., 6 weeks, p. 293; U. S. Steel Corp., 6 weeks, p. 297; Upholstering & Allied Trades Industries, 6 weeks, p. 303; Westvaco Corp., 6 weeks, p. 307; Wyandotte Worsted Co., 6 weeks, p. 311.

serts that women receive a disproportionate share of disability benefits and that it makes equal monetary contributions to the Income Protection Plan for men and women.[23] Nowhere is either assertion supported in the record. What is reflected, however, is that if indeed women contribute less to the Income Protection Plan than do men, it is because contributions are based on salary and women in the class have been paid approximately $2,500.00 a year less than their male counterparts (A. 137).

---

23. Brief for Petitioner, pp. 8, 15, 22.

CONCLUSION

This case was decided on Respondents' motion for summary judgment. Their employer presented no defenses and there was no disputed question of fact. All questions below, and all questions herein, are questions of law. Virtually every court which has considered these questions has answered them in the same manner as did the distinguished trial judge and the court of appeals. Any other answers would mark a serious retreat from the enlightened procedural and substantive decisions of this Court in the areas of Title VII and other civil rights litigation.

In light of all of the foregoing, Respondents respectfully pray that the judgment of the court of appeals be affirmed in all respects.

Respectfully submitted,

HOWARD A. SPECTER
1320 Grant Building
Pittsburgh, Pennsylvania 15219

Attorney for Respondents

Of Counsel:

LITMAN LITMAN HARRIS & SPECTER, P.A.
1320 Grant Building
Pittsburgh, Pennsylvania 15219

FINE, PERLOW & STONE
1528 Frick Building
Pittsburgh, Pennsylvania 15219

Supreme Court, U. S.
FILED
JAN 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,

Petitioner,

vs.

SANDRA WETZEL, AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

KALVIN M. GROVE
LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
LEDERER, FOX AND GROVE
Sears Tower—Suite 7916
233 South Wacker Drive
Chicago, Illinois 60606

ROBERT A. EBERTZ
175 Berkeley Street
Boston, Massachusetts 02226

CLEN R. KYLE
717 Liberty Avenue
Pittsburgh, Pennsylvania 15222
Attorneys for Liberty Mutual Insurance Company

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL, AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

In reply to the brief of Respondents, Petitioner Liberty Mutual Insurance Company (hereafter "Liberty" or the "Company") states:

1. In its principal brief (pp. 7-15) Liberty demonstrated that in *Geduldig* v. *Aiello*, 417 U. S. 484 (1974) this Court resolved the threshold question herein, determining that a pregnancy exclusion in a disability income plan does not constitute gender discrimination *per se*. Respondents do not contest that assertion,[1] but instead rely primarily on a result-oriented theory,

---

1. Respondents do attempt to obfuscate the applicability of *Geduldig* by pointing out (p. 22) that *Geduldig* dealt with a "constitutional attack under the Equal Protection Clause." That

predicated upon an interpretation of *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), to support their contention that they have established a *prima facie* case. See Resp. br., pp. 8, 11. Liberty submits that Respondents seek to misapply *Griggs*, and have not established a *prima facie* case.

2. If an employer failed to similarly insure males and females against the same risk, there would be a *prima facie* case of discrimination, shifting the burden of proof to the employer. Such a case would be closely analogous to *McDonnell Douglas* v. *Green*, 411 U. S. 782 (1973). Here, however, the situation is, as it was in *Geduldig*, markedly different, and, accordingly, so must the requisite allocation of proof. In *Geduldig* this Court recognized "the lack of identity between the excluded disability [pregnancy] and gender as such. . . ." 417 U. S. at 496-497 n. 20. Notwithstanding, therefore, whether pregnancy is included or excluded from the covered risks under an insurance program, there is:

> . . . no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not. 417 U. S. at 496-497 (footnote omitted).

In such circumstances, without more, no basis exists for a claim that there is a discriminatory employment practice. Stated

---

contention, however, does not further their cause. As Judge Widener stated in dissent in *Gilbert et al* v. *General Electric Company* (..... F.2d ..... (4th Cir. 1975), *cert. granted* No. 74-1589):

> The inquiry in this case must therefore focus initially on whether exclusion of pregnancy related disability from the disability benefits plan is sex discrimination. If it is not sex discrimination, then, regardless of what test is applied there is no Title VII violation. . . . Absent a showing of sex discrimination, Title VII, even if its reach were broader than the equal protection clause would not render unlawful a pregnancy exclusion such as that involved here.

See also Comment, *Geduldig* v. *Aiello*: *Pregnancy Classifications and the Definition of Sex Discrimination*, 75 Col. L. Rev. 441, 466-468 (1975). Hence, if the exclusion of pregnancy in *Geduldig* was not discrimination based on gender "as such," it may not become discrimination "as such" under the Act.

differently where, as here, both men and women are protected from the same risks, and the challenge is, as it was in *Geduldig* (*id.* at 494), to the "underinclusiveness of the set of risks" for which protection is offered, a plaintiff can not rely, as was done in this case, solely on establishing that an insurance exclusion impacts on men and women unequally. Otherwise the exclusion of any risk, except those risks, if any, which affect men and women identically, would be prohibited.

3. The appropriate test to determine the legality of an employer's insurance program requires an evaluation of the parity of economic benefits afforded its employees. If, as here, an employer pays equal insurance premiums on behalf of every employee—both men and women—, and provides for equal benefits for each employee for the same risks, a violation of the Act cannot be assumed, as Respondents would contend, because the employer is providing all that the Act requires—equality. Instead the burden of proof remains on a plaintiff to utilize the discovery powers provided in the federal courts to demonstrate under *Griggs* that an employer's insurance policy denies a protected group its proportional share of the total benefits actually disbursed to employees. Here the evidence is undisputed that the benefits available to, and the premiums paid on behalf of each employee—male or female—are determined by the identical formula. See Lib. Prin. br., p. 2 n. 2. Accordingly, in the absence of any evidence that the distribution of aggregate benefits is disproportionately weighted in favor of either men or women, plaintiffs' assertions under *Griggs* must be dismissed. To construe *Griggs* otherwise would require that a greater economic benefit be provided to one group whenever there are actual biological differences. *Griggs*, it is submitted, does not require such preferential treatment to compensate for differences that in fact exist. See Lib. Prin. br., p. 23, n. 45.

4. Finally, Respondents have attempted to obfuscate the legal analysis of the issue before this Court by referring to other issues litigated below. While Liberty was found guilty of

certain past violations of the Act, the District Court has expressly held that Liberty's current system complies with the Act, except for the single policy presented herein, so that no injunctive relief is necessary.[2] In the absence of either a finding by the District Court that the disputed exclusion is "pretextual", or an appeal by Respondents from the District Court's failure to make such a finding, Respondents are barred from relying on such a contention here. The sole issue presented in the instant matter is the application of *Griggs* to insurance protection.

5. In conclusion for all of the foregoing reasons and those reasons presented in its principal brief, Liberty requests that the judgment of the Court of Appeals be reversed insofar as it affirmed the District Court's grant of summary judgment and found Liberty's disability income protection plan is violative of the Act.

Respectfully submitted,

KALVIN M. GROVE
LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
LEDERER, FOX AND GROVE
Sears Tower—Suite 7916
233 South Wacker Drive
Chicago, Illinois 60606

ROBERT A. PENNEY
175 Berkeley Street
Boston, Massachusetts 02226

CLEM R. KYLE
717 Liberty Avenue
Pittsburgh, Pennsylvania 15222
Attorneys for Liberty Mutual Insurance Company

2. See. Lib. prin. br., p. 4 n. 6. Subsequent to the filing of Liberty's principal brief the District Court found that Liberty's leave policy is in compliance with the Act. See Appendix A hereto.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

SANDRA WETZEL and MARI ROSS on behalf of themselves and all other persons similarly situated, *Plaintiffs,* vs. LIBERTY MUTUAL INSURANCE COMPANY, a corporation, *Defendant.*	Civil Action No. 72-169

MEMORANDUM ORDER.

* * * * *

We were informed by letter of the defendant dated November 10, 1975, that the defendant changed its maternity leave policies in accordance with the opinion of this court as affirmed by the Court of Appeals. This was not a matter covered by the pending appeal to the Supreme Court. The letter of November 10, 1975, indicates that the company's maternity leave of absence policy will now be as follows:

> "Pregnancy leave of absence will expire on the date that it is medically determined that the employee is able to work."

While the plaintiff moved for a mandatory injunction requiring the defendant to abide by a non-discriminatory pregnancy leave policy, it does not appear that any such injunction is necessary in view of the announcement of the defendant that it will abide by the terms of the Opinion of the Court of Appeals that defendant must provide leave for pregnancy on the same basis

as it does for other temporary disabilities. We find no merit to the objection voiced in a letter of plaintiff's counsel to this court that this policy is retaliatory because it may provide for a shorter period of disability than the arbitrary 90 days limit for return to work after delivery previously enforced by the defendant company, which was condemned by the court as discriminatory. All that the opinions of this court and the circuit court have required is that pregnancy leave of absence be determined in the same manner as leave of absence for any other temporary disability. All that is required of the defendant is the filing with the Clerk of this court of some evidence of compliance with this mandate. If no such evidence is filed an application for a mandatory order from the plaintiff may be considered.

ORDERED filed this 10th day of December, 1975.

/s/ GERALD J. WEBER
Gerald J. Weber
United States District Judge

cc: HOWARD SPECTER, ESQ.
Grant Building
Pittsburgh, Pennsylvania 15219

KALVIN M. GROVE, ESQ.
Sears Tower, Suite 7916
233 South Wacker Drive
Chicago, Ill. 60606

CLEM R. KYLE, ESQ.
4140 U. S. Steel Building
Pittsburgh, Pa. 15219

ROBERT A. PENNEY, ESQ.
175 Berkeley Street
Boston, Mass. 02226

BETH L. DON, ESQ.
Equal Employment Opportunity Commission
2401 E. St. N. W.
Washington D. C. 20506

Supreme Court, U. S.
FILED
JAN 10 1976
MICHAEL RODAK, JR., CLERK

Nos. 74-1245, 74-1589 and 74-1590

In the Supreme Court of the United States

OCTOBER TERM, 1975

LIBERTY MUTUAL INSURANCE COMPANY, PETITIONER
v.
SANDRA WETZEL, ET AL.

GENERAL ELECTRIC COMPANY, PETITIONER
v.
MARTHA V. GILBERT, ET AL.

MARTHA V. GILBERT, ET AL., PETITIONER
v.
GENERAL ELECTRIC COMPANY

RECEIVED
JAN 10 1976
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FOURTH CIRCUITS

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

ROBERT H. BORK,
Solicitor General,
J. STANLEY POTTINGER,
Assistant Attorney General,
BRIAN K. LANDSBERG,
WALTER W. BARNETT,
MARK L. GROSS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

ABNER W. SIBAL,
General Counsel,
JOSEPH T. EDDINS,
Associate General Counsel,
BEATRICE ROSENBERG,
LINDA COLVARD DORIAN,
BETH L. DON,
Attorneys,
Equal Employment Opportunity Commission,
Washington, D.C. 20506.

INDEX

	Page
Question presented	1
Interest of the United States	2
Statement	3
1. *Liberty Mutual Insurance Co.* v. *Wetzel*	4
2. *General Electric Co.* v. *Gilbert*	6
Summary of argument	7
Argument:	
I. Title VII forbids the complete exclusion of pregnancy-related disabilities from the benefits afforded by an employer's income protection plan which protects employees against other, similar disabilities	9
A. The exclusion of pregnancy-related disability from the plans here at issue is a *prima facie* violation of Title VII	9
B. This Court's decision in *Geduldig* v. *Aiello* does not bar a finding that a classification based on pregnancy violates Title VII	18
C. Guidelines issued by the responsible administrative agency properly interpret Title VII to prohibit the exclusion of pregnancy-related disability from an otherwise comprehensive disability benefits plan	22

212-450—75——1

Argument—Continued
II. The business considerations proffered by petitioners do not provide sufficient justification to overcome the *prima facie* violation of Title VII.. 26
Conclusion 32
Appendix 33

CITATION

Cases:

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 ..... 11, 23
Boston Chapter, NAACP v. *Beecher*, 504 F. 2d 1017, certiorari denied, 421 U.S. 910 17
Bowe v. *Colgate Palmolive Co.*, 489 F. 2d 896 ..... 11, 16
Cheatwood v. *South Central Bell Tel. & Tel. Co.*, 303 F. Supp. 754..... 16
Commonwealth of Pennsylvania v. *O'Neill*, 473 F. 2d 1029..... 17
Communications Workers of America v. *American Telephone and Telegraph Co.*, 513 F. 2d 1024, pending on petition for a writ of certiorari, No. 74-1601..... 18
Dandridge v. *Williams*, 397 U.S. 471..... 19
Danielson v. *Board of Higher Education*, 358 F. Supp. 22..... 30
Danner v. *Phillips Petroleum Co.*, 447 F. 2d 159..... 11, 17
Davis v. *Washington*, 512 F. 2d 956, certiorari granted, No. 74-1492 (October 6, 1975) 17
Diaz v. *Pan American World Airways, Inc.*, 442 F.2d 385..... 27

Cases—Continued

Espinoza v. *Farah Manufacturing Co.*, 414 U.S. 86..... 23, 24
Fitzpatrick v. *Bitzer*, certiorari granted, December 15, 1975 (No. 75-251)..... 7, 8
Geduldig v. Aiello, 417 U.S. 484..... 5, 7, 8, 15, 17, 18, 19
Goesaert v. *Cleary*, 335 U.S. 464..... 21
Gregory v. *Litton Systems, Inc.* 472 F. 2d 631 20
Griggs v. *Duke Power Co.*, 401 U.S. 424.. 10, 11, 17, 23, 26
Holthaus v. *Compton & Sons, Inc.*, 514 F. 2d 651..... 19
Hutchison v. *Lake Oswego School District*, 519 F. 2d 961..... 18
Jefferson v. *Hackney*, 406 U.S. 535..... 19
Jones v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245, certiorari denied, 401 U.S. 954 27
Kotch v. *Board of River Pilot Commissioners*, 330 U.S. 552..... 22
Krause v. *Sacramento Inn*, 479 F. 2d 988.. 22
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792..... 10
Manhart v. *City of Los Angeles*, 387 F. Supp. 980..... 14
Muller v. *U.S. Steel Corp*, 509 F. 2d 923.. 17
Palmer v. *General Mills, Inc.*, 513 F. 2d 1040 11
Phillips v. *Martin Marietta Corp.*, 400 U.S. 542 ..... 10, 13
Robinson v. *Lorillard Corp.*, 444 F. 2d 791 ..... 26, 27

Cases—Continued

Rogers v. *Equal Employment Opportunity Commission*, 454 F. 2d 234 ---------- 10
Rosen v. *Public Service Electric & Gas Co.*, 477 F. 2d 90 ---------- 10
Rosenfeld v. *Southern Pacific Company*, 444 F. 2d 1219 ---------- 16, 21
Satty v. *Nashville Gas Co.*, 11 FEP Cases 1 ---------- 18
Smith v. *Troyan*, 520 F. 2d 492, petition for a writ of certiorari pending, No. 75–734 ---------- 22
Sprogis v. *United Air Lines, Inc.*, 444 F. 2d 1194, certiorari denied, 404 U.S. 991 -- 10–11, 15
Tyler v. *Vickery*, 517 F. 2d 1089 ---------- 18, 22
Udall v. *Tallman*, 380 U.S. 1 ---------- 23
United States v. *Bethlehem Steel Corp.*, 446 F. 2d 652 ---------- 27
United States v. *C & O Ry. Co.*, 471 F. 2d 582 certiorari denied, 411 U.S. 939 ------ 17
United States v. *Hayes Int'l Corp.*, 456 F. 2d 112 ---------- 17
United States v. *Ironworkers Local 86*, 443 F. 2d 544, certiorari denied, 404 U.S. 984 ---------- 17
United States v. *Masonry Contractors Ass'n of Memphis, Inc.*, 497 F. 2d 871 -- 17
United States v. *N. L. Industries, Inc.*, 479 F. 2d 354 ---------- 17
United States v. *St. Louis-San Francisco Ry. Co.*, 464 F. 2d 301, certiorari denied, 409 U.S. 1107 ---------- 27
United States v. *United Bro. of Carpenters and Joiners, Local 169*, 457 F. 2d 210, certiorari denied, 409 U.S. 851 ------- 17

Cases—Continued

United States v. *Wood, Wire and Metal Lath Int'l Union, Local No. 46*, 471, F. 2d 408, certiorari denied, 412 U.S. 939 -- 17
Wallace v. *Debron Corp.* 494 F. 2d 674 ---- 20
Weeks v. *Southern Bell Tel. & Tel. Co.*, 408 F. 2d 288 ---------- 11, 21
West Coast Hotel Co. v. *Parrish*, 300 U.S. 379 ---------- 21
Wetzel v. *Liberty Mutual*, 511 F. 2d 199 - 3, 12, 22
Williamson v. *Lee Optical Co.*, 384 U.S. 483 ---------- 19, 20

Statutes and regulations:

Civil Rights Act of 1964, Title VII, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq* ---------- 2
Section 703(a), 42 U.S.C. 2000e–2(a) ---------- 5, 10, 17
Section 706(f)(1), 42 U.S.C. (Supp. IV) 2000e–5(f)(1) ---------- 2
Section 717, 42 U.S.C. (Supp. IV) 2000e–16 ---------- 2
Education Amendments of 1972, Title IX, 86 Stat. 373, as amended, 20 U.S.C. (Supp. IV) 1681 ---------- 3, 25
Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484 ---------- 25
Equal Pay Act, 77 Stat. 56, as amended, 29 U.S.C. 206(d) ---------- 14
5 C.F.R. 630.401(b) ---------- 3
29 C.F.R. 800.116(d) ---------- 14–15
29 C.F.R. 1604.9 ---------- 2, 22, 33
29 C.F.R. 1604.9(b) ---------- 10, 30
29 C.F.R. 1604.9(e) ---------- 27
29 C.F.R. 1604.10 ---------- 2, 22, 33

Statutes and regulations—Continued
29 C.F.R. 1604.10(b) ---------- 5, 33
41 C.F.R. 60-20.3(c) ---------- 24
45 C.F.R. Part 86, as added, 40 Fed. Reg. 24128 ---------- 24
45 C.F.R. 86.57(c), as added, 40 Fed. Reg. 24144 ---------- 25
Miscellaneous:
120 Cong. Rec. H12332-12334 (daily ed. Dec. 19, 1974) ---------- 26
121 Cong. Rec. C9714-9715 (daily ed. June 5, 1975) ---------- 26
Federal Personnel Manual, Chapter 630, Subchapter 13, § 13-2 (April 30, 1975) -- 3
38 Fed. Reg. 35338 ---------- 24

In the Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 74-1245, 74-1589 and 74-1590

LIBERTY MUTUAL INSURANCE COMPANY, PETITIONER

v.

SANDRA WETZEL, ET AL.

GENERAL ELECTRIC COMPANY, PETITIONER

v.

MARTHA V. GILBERT, ET AL.

MARTHA V. GILBERT, ET AL., PETITIONER

v.

GENERAL ELECTRIC COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FOURTH CIRCUITS

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

QUESTION PRESENTED

Whether a private employer's exclusion of pregnancy and pregnancy-related disabilities from an

otherwise comprehensive employee disability income protection plan constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.*

INTEREST OF THE UNITED STATES

The responsibility for federal enforcement of Title VII has been given by Congress to the Department of Justice, the Equal Employment Opportunity Commission, and the Civil Service Commission. Under 42 U.S.C. (Supp. IV) 2000e–5(f)(1), the Equal Employment Opportunity Commission may bring a civil action against a private employer if, following the filing of an individual's charge with the Commission, conciliation efforts fail. When the employer is a government, governmental agency, or political subdivision, excluding the federal government, the Commission may refer the case to the Attorney General for suit. When federal employment practices are at issue, the Civil Service Commission, in addition to exerting oversight responsibility to insure nondiscrimination in federal employment, serves as the reviewing administrative authority for Title VII charges filed by individual employees against federal agencies. 42 U.S.C. (Supp. IV) 2000e–16.

Both the Equal Employment Opportunity Commission and the Civil Service Commission have issued guidelines to effectuate the provisions of Title VII. Two of the EEOC guidelines, 29 C.F.R. 1604.9 and 1604.10, are directly applicable here and were relied upon by both courts of appeals in support of their decisions in these cases[1] (*Wetzel* v. *Liberty Mutual,*

511 F.2d 199, 204, n. 5 (C.A. 3); *Gilbert* v. *General Electric Co.,* 10 FEP Cases 1201 (C.A. 4), opinion printed in the Supplemental Brief of all Parties to the Joint Petition for a Writ of Certiorari,[2] at 3a, n. 7).

Moreover, pursuant to Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. (Supp. IV) 1681, the Department of Health, Education, and Welfare promulgated regulations concerning pregnancy disability which were signed by the President and submitted to the Congress. Although these regulations are not applicable here since petitioners are not within the ambit of the education amendments, the validity of this administrative interpretation will be affected by the Court's decision in these cases.

Also, since resolution of these cases will affect the responsibilities not only of private employers, but of governmental employers as well, the Court's decision will affect the Title VII enforcement responsibility of several federal agencies.

STATEMENT

The petitioner employers in the cases before this Court are private employers which maintain income disability protection plans designed to help employees

[1] Although federal maternity leave policies are not directly involved in either suit, they are consistent with the policies reflected in these EEOC guidelines. Pregnancy disability leave is treated under the same sick leave provisions as are all other disabilities. See *Federal Personnel Manual*, Chapter 630, Subchapter 13, § 13–2 (April 30, 1975). See also 5 C.F.R. 630.401(b).

[2] Hereinafter cited "Jt. Supp. Pet."

212–450—75——2

through periods of disability. The plans, to which employees must subscribe, accomplish this by providing the disabled employee with a percentage of his or her weekly income during the period of disability. Both plans specifically exclude pregnancy disability from coverage.

1. *Liberty Mutual Insurance Co.* v. *Wetzel*

This suit was filed as a class action, alleging a broad range of sexually discriminatory treatment,[3] including the exclusion of pregnancy from the income disability plan. The plan states that "[w]hen disability from illness or accident keeps you away from work, your Income Protection Plan is designed to continue a portion of your usual earnings" (Br. of Lib. Mut. at A2).

In addition to excluding disability from pregnancy or any cause related to pregnancy, the Liberty Mutual plan excludes disability caused by acts of war or undeclared war, attempted suicide or intentionally self-inflicted injury, or any disability not requiring the attendance of a physician licensed to prescribe and administer drugs and to perform all surgical procedures (App. 99).[4]

The employee covered by the Liberty Mutual plan

[3] Other issues initially in this suit involved pay differentials, discriminatory hiring practices, discriminatory job classifications, and maternity leave practices. These issues were resolved below adversely to the employer and are not before this Court. See 508 F.2d 239 (C.A. 3), certiorari denied, 421 U.S. 1011, and 511 F.2d 199 (C.A. 3), certiorari granted on another issue, 421 U.S. 987.

[4] Citations to the *Wetzel* appendix appear as "App."

pays 33 cents per one hundred dollars of salary (App. 99). According to the petitioner's booklet, this is approximately one-third the cost of the plan, and the balance is paid for by the petitioner (App. 99).

On plaintiffs' motion for summary judgment, the district court held that the employer's practice violated Section 703(a) of Title VII and granted plaintiffs' motion for partial summary judgment (372 F. Supp. 1146 (W.D. Pa.)). The Third Circuit affirmed (511 F.2d 199). The court of appeals rejected petitioner's reliance on this Court's opinion in *Geduldig* v. *Aiello*, 417 U.S. 484, holding that the constitutional interpretation of *Geduldig* was not directly applicable to the statutory interpretation of Title VII. The court noted, and deferred to, the applicable EEOC guideline (29 C.F.R. 1604.10(b)) which indicates that benefits are to be applied to pregnancy disability on the same basis as benefits are applied to other disabilities. The court of appeals rejected petitioner's justifications for excluding pregnancy from the disabilities covered by its plan, and concluded that the practice violated Title VII because "[t]he company's policy is neutral on its face but treats a protected class of persons in a disparate manner. This is precisely what Title VII intends to strike down." 511 F.2d at 206–207.[5]

[5] Liberty Mutual did not offer to introduce any evidence in support of its contention that the costs of including pregnancy-related disabilities preclude its expanding the coverage of its plan (see 511 F.2d at 206). Instead, it took the position that the cost of including pregnancy-related disabilities could not be reliably estimated (App. 165, 194).

2. *General Electric Co.* v. *Gilbert*

This suit was also filed as a class action, limited to the issue of exclusion of pregnancy from GE's disability income protection plan. The plan, which includes sickness and accident coverage, as well as life and medical insurance components, states that "[t]his plan is designed to help you and your dependents meet the threats to security that are brought about by loss of wages through death or disability and the medical expenses which occur when you or one of your dependents have a sickness or accident" (III App. 1062).[6] The plan excludes only disability from pregnancy (or suffered while absent from work due to pregnancy, see II App. 423) or from complications in connection with pregnancy and childbirth (III App. 1066).[7] The GE Sickness and Accident Insurance Plan, at one time financed partially by employee contributions, is at present financed totally by the employer (III App. 1067), which is a self-insurer (I App. 175, 241).

Following a trial, the district court held that the exclusion of pregnancy-related disabilities violates Title VII's prohibition against sex discrimination. The court of appeals affirmed, finding that the exclusion is sex-linked and a violation of Title VII, and that pregnancy-related disabilities do not differ significantly from other disabilities covered by the plan. As in *Wetzel*, the court rejected the "voluntariness" distinction offered by the employer, finding that the plan covers other disabilities voluntarily incurred (Jt. Supp. Pet. 6a–7a). The court, as did the Third Circuit in *Wetzel*, rejected petitioner's reliance on *Geduldig*, *supra*, noting that Title VII's standards were not the same as those applied by this Court in *Geduldig*.

[6] Citations to the *Gilbert* Appendix appear as "(volume no.) App."

[7] Coverage is included, *inter alia*, for elective surgery, for disabilities resulting from self-inflicted injuries (including attempted suicide), and for disabilities resulting from an employee's commission, or attempt to commit, an assault, battery or felony (II App. 608, 614–615).

Unlike the petitioner in *Wetzel*, GE had offered evidence in the district court on the issue of increased cost of inclusion of pregnancy benefits for the purpose of disproving intent to discriminate. The district court viewed the cost evidence within the context of a business necessity defense, and found that the standard imposed by that defense was not proved by the cost evidence. The court of appeals held the cost evidence irrelevant, noting that it was not offered as a business necessity defense (and, indeed, that such a defense was specifically disclaimed), but to disprove the possibility of proof of invidious intent left open by *Geduldig*. Because *Geduldig* was inapplicable, the court of appeals ruled, it had no occasion to consider the cost evidence (Jt. Supp. Pet. 10a–11a and n. 23).

SUMMARY OF ARGUMENT

By including sex as one of the prohibited bases of discrimination in Title VII of the Civil Rights Act of 1964, Congress enacted a broad prohibition against employment practices which differentiate between employees on a sexual basis to the detriment of either sex. See *Fitzpatrick* v. *Bitzer*, 10 FEP Cases 956, (C.A. 2), certiorari granted on other issues, Decem-

ber 15, 1975 (No. 75–251). The disability insurance plans at issue here comprehensively cover all substantial risks of employee income loss due to disability except for pregnancy-related disabilities. Their net effect, therefore, is to subject only women employees to a substantial risk of total loss of income because of temporary medical disability. This is necessarily a discrimination on the basis of sex in *prima facie* violation of Title VII, regardless of the extent to which women as a statistical group benefit from the plans' coverage of other causes of disability. Whether or not the latter consideration might in other circumstances justify special treatment of pregnancy coverage within a disability plan, it cannot compensate for subjecting only women to the risk of disability without income protection by total exclusion of pregnancy-related disabilities from the present, otherwise comprehensive plans.

This Court's decision in *Geduldig* v. *Aiello,* 417 U.S. 484, is not to the contrary. As the six courts of appeals which have addressed the issue have unanimously stated, the Court's hold in *Geduldig* that the Fourteenth Amendment permits a state to proceed one step at a time in enacting a disability benefits program does not require or even suggest that Congress' comprehensive (rather than one-step-at-a-time) prohibition of all forms of sex discrimination in employment in Title VII should be interpreted to permit exclusion of pregnancy coverage from otherwise comprehensive employee disability insurance plans.

Nor did the courts below err in relying on the applicable guideline of the Equal Employment Opportunity Commission. There is no indication that the guideline is contrary to congressional intent, and this Court has explicitly stated that the fact the responsible agency has changed its position on an issue does not mean that its current interpretative regulation is not entitled to judicial deference.

Finally, petitioners' asserted justifications for the pregnancy exclusion do not constitute the showing of business necessity required to rebut a *prima facie* violation of Title VII. The justifications offered here are solely cost-related, and petitioners have not shown that the cost of a disability insurance program which accommodates pregnancy disability would in some manner be prohibitive. Regardless of whether some actuarial-based method of insuring the risk of pregnancy-related disability might be devised that would apportion the costs of the program fairly and still be consistent with Title VII, the complete exclusion presented in these cases is prohibited by Title VII.

ARGUMENT

I

TITLE VII FORBIDS THE COMPLETE EXCLUSION OF PREGNANCY-RELATED DISABILITIES FROM THE BENEFITS AFFORDED BY AN EMPLOYER'S INCOME PROTECTION PLAN WHICH PROTECTS EMPLOYEES AGAINST OTHER, SIMILAR DISABILITIES

A. THE EXCLUSION OF PREGNANCY-RELATED DISABILITY FROM THE PLANS HERE AT ISSUE IS A *PRIMA FACIE* VIOLATION OF TITLE VII

In enacting Title VII of the Civil Rights Act of 1964, Congress established a broad prohibition of un-

equal treatment by employers of their employees on the basis of race, religion, national origin, or sex. This Court, on the several occasions when it has considered Title VII in the context of racial discrimination, has recognized that Congress' purpose in enacting Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800. See also *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429–430. Since Section 703(a) established a similar prohibition for discriminatory practices based on sex, *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, it is clear that Title VII was intended as well to eliminate employment practices[8] which disparately treat men and women:

> In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

[8] Petitioner GE argues that a benefit of employment is less "significant" than an employment opportunity and is afforded less protection by Title VII (see Br. of GE at 53–54.). The Act, however, specifically states (Section 703(a)) that it is an unlawful employment practice to "fail or refuse to hire * * *, or otherwise to discriminate * * * with respect to compensation, terms, conditions, or privileges of employment, because of * * * sex," indicating no difference between its prohibition of discrimination in hiring and in other areas of employment practices. See 29 C.F.R. 1604.9(b), the EEOC guideline which prohibits discrimination in the application of fringe benefits in similar terms, which is set forth at p. 33, *infra*. See also *Rosen* v. *Public Service Electric & Gas Co.*, 477 F.2d 90 (C.A. 3); *Rogers* v. *Equal Employment Opportunity Commission*, 454 F.2d 234 (C.A. 5).

Sprogis v. *United Air Lines, Inc.*, 444 F.2d 1194, 1198 (C.A. 7), certiorari denied, 404 U.S. 991. Although present judicial standards for assessing challenges made under Title VII have, for the most part, arisen in cases considering practices found to affect employees detrimentally on a racial basis, those standards are equally applicable to sex-based claims, and provide proper guidance for deciding whether the practice violates Title VII. *Palmer* v. *General Mills, Inc.*, 513 F.2d 1040, 1042–1043 (C.A. 6); *Bowe* v. *Colgate, Palmolive Co.*, 489 F.2d 896, 900 (C.A. 7).

In *Griggs, supra,* this Court held that "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation" (401 U.S. at 431), and emphasized that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation" (*id.* at 432). See also *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405. Accordingly, an employment practice may be found to be a *prima facie* violation of Title VII's prohibition against sexual discrimination either by proof that it is specifically directed only at one sex, *Weeks* v. *Southern Bell Tel. & Tel. Co.,* 408 F.2d 288 (C.A. 5), or by proof that the practice, however sexually neutral it appears to be, affects primarily members of one sex, *Danner* v. *Phillips Petroleum Co.,* 447 F.2d 159 (C.A. 5).

The disability insurance plans before this Court both specifically exclude pregnancy disability from their otherwise comprehensive coverage. Their underlying purpose is, of course, to protect the disabled

employee against the twin hardships of loss of income due to inability to work and medical expenses. The disabled pregnant employee, however, is no less affected by the need for such protection than is any other disabled employee. And, in contrast to the other, quite unusual causes of disability not covered by the Liberty Mutual plan which affect both men and women (see p. 4, *supra*), "[p]regnancy is," as the court of appeals stated in *Gilbert*, "a condition unique to women" (Supp. Jt. Pet. 4a).

The net result of the pregnancy exclusion in these plans, therefore, is to subject only women to a substantial risk of total loss of income because of temporary medical disability.[9] Men (and, of course,

[9] Both petitioners seek to distinguish pregnancy from the conditions covered by their respective plans to justify its exclusion (see Br. of Liberty Mutual at 16–19; Br. of GE at 62–66). Primary reliance is placed on the proposition that pregnancy is a voluntary condition, and not a sickness or a disease, and, therefore, may properly be excluded from an employee insurance program designed to provide benefits to employees unable to work due to sickness or disease-related disability.

Both courts of appeals rejected this alleged distinction (*Wetzel*, 511 F.2d at 206, *Gilbert*, Jt. Supp. Pet. at 6a–7a). Both plans cover disabilities which result from voluntary activities, such as sports injuries or venereal disease (which, like pregnancy, may be an unintended consequence of voluntary sexual activities). Similarly, both plans cover voluntarily incurred disabilities resulting from cosmetic or other elective surgery, rather than from sickness or disease. In addition, pregnancy may not always be voluntary, and the complications of pregnancy, which are a sickness not voluntarily assumed, are also excluded from the petitioners' plans (App. 99, III App. 1066). In short, the purpose of these plans is comprehensively to provide a temporary source of income to employees unable to work due to physical disability, and there is no sexually neutral basis for the exclusion from these plans of pregnancy-related disability.

To the extent the pregnancy exclusion may reflect concern with possible malingering or with the possibility that the employee may not return to work after the period of disability, there are obvious means available for dealing more comprehensively with those concerns without discriminating against pregnancy-related disabilities.

women physically unable to become pregnant) are subject to no such risk under the General Electric plan and to only slight risk of that consequence (a risk also shared by all the women) under the Liberty Mutual plan.

The fact that the plans subject only some, rather than all, of the women employees to this substantial risk is not significant for Title VII purposes, since it is settled that the Act affords protection against discriminations based on sex (or race, etc.) plus another characteristic. See *Phillips* v. *Martin Marietta Corp.*, *supra* (employment distinction based on parental status excluded only women); *Sprogis*, *supra* (employment distinction based on marital status excluded only women).

Nor, in our view, can there be a basis for rebutting the *prima facie* discriminatory effect of the pregnancy exclusion in the fact that women (if not absent from work due to pregnancy) are entitled to share equally with men in the benefits afforded by the plans for non-pregnancy-related disabilities. Even if it could be shown that women as a statistical group are receiving a larger proportional share than men of these other benefits, that would not compensate for

the fact that only women (including women who may never receive any benefits) are subject under the plans to a substantial risk of total income loss because of medical disability. Insulating men from that risk while leaving women subject to it is necessarily discriminatory—regardless of whether evidence of costs and actuarial statistics could ever be used (short of a showing of business necessity, discussed in point II, *infra*) to rebut the *prima facie* inference of discrimination that would arise from special treatment (such as increased employee premium charges or reduced benefits) of pregnancy coverage within a comprehensive disability plan.[10] The latter issue is, of course,

[10] An employer providing such special treatment of employees requiring pregnancy coverage might thus seek to distinguish between a statistical rebuttal of a *prima facie* inference of discrimination and the showing of business necessity required to rebut a *prima facie* inference of a violation (when the inference of discrimination remains unrebutted). Whether Title VII permits such statistically based "play in the joints" is a matter of controversy that arises in various contexts. See, *e.g.*, *Manhart* v. *City of Los Angeles*, 387 F. Supp. 980 (C.D. Cal.), pending on appeal, C.A. 9, Nos. 75–2729 and 75–2807 (involving employee pension annuity plans). The Equal Employment Opportunity Commission has, for the most part, taken the position that disparate treatment of individuals on the basis of sex (or race, etc.) can be justified only by a showing of business necessity, and not merely by reliance on statistical characteristics of a protected class to which those individuals (who may or may not be typical of the class) belong. On the other hand, a pertinent regulation of the Wage and Hour Division of the Department of Labor under the Equal Pay Act, 77 Stat. 56, as amended, 29 U.S.C. 206(d), interprets that Act as permitting some flexibility in the present context:

"*Contributions to employee benefit plans.* If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees." 29 C.F.R. 800.116(d).

not before the Court since both of the plans here totally exclude pregnancy-related disabilities from coverage.

Petitioners in both cases appear to argue that the exclusion of pregnancy benefits does not violate Title VII because there is no distinction between men and women under the exclusion (see, *e.g.*, Lib. Mut. Br. in *Wetzel* at 21), suggesting that, because men do not become pregnant, the exclusion of pregnancy benefits does not disparately treat men and women employees.[11]

The fact that women have different physical attributes from men does not, without more, justify applying different rules to women employees based on those attributes. "Discrimination is not to be tolerated [under Title VII] under the guise of physical properties possessed by one sex." *Sprogis, supra,* 444 F. 2d at 1198. In cases where employment practices which

[11] To this end, both Liberty Mutual and General Electric place primary reliance on this Court's opinion in *Geduldig* v. *Aiello*, *supra*, which held that the exclusion of pregnancy disability from a California disability insurance, social welfare program did not violate the Fourteenth Amendment by invidiously discriminating against women. For the reasons set forth below (see pp. 18–22, *infra*), the decision in *Geduldig* does not establish that the practice here is not a *prima facie* violation of Title VII.

BEST COPY AVAILABLE

detrimentally affected women employees were based on physical properties of women generally, this justification has not been accepted as a barrier to the establishment of a *prima facie* case but has been considered only in the context of whether the business necessity defense justifies the sexual classification, or the sexual effect of the particular practice involved. For example, in *Rosenfeld* v. *Southern Pacific Company,* 444 F.2d 1219 (C.A. 9), the employer refused to assign women to certain jobs, based in part on the view that the "arduous nature of the work-related activity renders women physically unsuited for the jobs" (*id.* at 1223). The court in *Rosenfeld* found the exclusion of women to be a *prima facie* violation of Title VII, and then examined the "strenuous physical demands" defense to see if sufficient justification for the practice was presented. See also *Bowe, supra,* and *Weeks, supra* (weight lifting limitations applied only to women were a *prima facie* violation); *Cheatwood* v. *South Central Bell Tel. & Tel. Co.,* 303 F. Supp. 754 (M.D. Ala.) (weight lifting requirement and the possible unavailability of restroom facilities could not justify exclusion of women).

In sum, the classifying factor, pregnancy, is not capable of being applied to both sexes, but is itself sexual in nature. Accordingly, while nearly all disabling conditions are covered, one which is tied directly to sex is not. Even though the pregnancy classification—involving a dichotomy between pregnant females and non-pregnant persons—may be regarded as

a sexually "neutral" policy, not aimed at women but only at a particular disability (see *Geduldig* v. *Aiello, supra,* 417 U.S. at 496–497, n. 20), the *prima facie* case of discrimination under Title VII is not disproved. For the pregnancy exclusion is, nonetheless, an instance of the application of an employment practice only to women, resulting in the denial of a benefit. And it is settled under Title VII that when an employment practice has the practical effect of distinguishing among employees on the basis of a prohibited factor to the substantial detriment of one such class, a *prima facie* violation of the statute has been proved. "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Griggs, supra,* 401 U.S. at 432.[12]

[12] Accordingly, all circuits have accepted the view that a statistical demonstration of a substantial disparate effect, regardless of motivation, on a characteristic covered by Section 703(a), is a *prima facie* violation of Title VII. *Boston Chapter, NAACP* v. *Beecher,* 504 F. 2d 1017, 1020, n. 5 (C.A. 1), certiorari denied, 421 U.S. 910; *United States* v. *Wood, Wire and Metal Lath. Int'l Union, Local No. 46,* 471 F. 2d 408, 414, n. 11 (C.A. 2), certiorari denied, 412 U.S. 939; *Commonwealth of Pennsylvania* v. *O'Neill,* 473 F. 2d 1029 (C.A. 3) (*en banc*); *United States* v. *C & O Ry. Co.,* 471 F. 2d 582, 586 (C.A. 4), certiorari denied, 411 U.S. 939; *United States* v. *Hayes Int'l Corp.,* 456 F. 2d 112, 120 (C.A. 5); *Danner, supra,* 447 F. 2d at 162; *United States* v. *Masonry Contractors Ass'n of Memphis, Inc.,* 497 F. 2d 871, 875 (C.A. 6); *United States* v. *United Bro. of Carpenters and Joiners, Local 169,* 457 F. 2d 210 (C.A. 7), certiorari denied, 409 U.S. 851; *United States* v. *N. L. Industries, Inc.,* 479 F. 2d 354, 368 (C.A. 8); *United States* v. *Ironworkers Local 86,* 443 F. 2d 544, 550–551 (C.A. 9), certiorari denied, 404 U.S. 984; *Muller* v. *U.S. Steel Corp.,* 509 F. 2d 923, 927 (C.A. 10); *Davis* v. *Washington,* 512 F. 2d 956, 960 (C.A.D.C.), certiorari granted, No. 74–1492 (October 6, 1975).

B. THIS COURT'S DECISION IN *GEDULDIG* V. *AIELLO* DOES NOT BAR A FINDING THAT A CLASSIFICATION BASED ON PREGNANCY VIOLATES TITLE VII

Both employers place primary reliance on this Court's opinion in *Geduldig* v. *Aiello, supra,* contending that the holding of that case is "dispositive" of the issue before this Court (*e.g.,* Br. of GE at 26). There are, however, important differences between the context in which *Geduldig,* a Fourteenth Amendment, social welfare case, arose, and the applicable requirements of Title VII.

Accordingly, six courts of appeals—the only appellate courts which have considered the issue—have stated, in holding or dictum, that *Geduldig* did not determine the validity of the pregnancy exclusion in the context of Title VII's statutory prohibition of any discrimination based on sex, and that such exclusion could amount to sex discrimination in violation of Title VII. See, in addition to the opinions of the two courts below, *Communications Workers of America* v. *American Telephone and Telegraph Co.*, 513 F. 2d 1024 (C.A. 2), petition for a writ of certiorari pending, No. 74–1601; *Satty* v. *Nashville Gas Co.,* 11 FEP Cases 1 (C.A. 6); *Hutchison* v. *Lake Oswego School District,* 519 F. 2d 961 (C.A. 9; *Tyler* v. *Vickery,* 517 F. 2d 1089 (C.A. 5).[13] The two courts below have, of

[13] In *Satty* and *Hutchison* the question was the use of accumulated sick leave, rather than exclusion from a disability program. However, the opinions of the Sixth and Ninth Circuits considered the situation as equivalent to that presented by the exclusion of pregnancy from a disability program. The Fifth Circuit opinion in *Tyler* is not addressed to a sex discrimination claim, but in distinguishing between constitutional and Title VII standards for

course, explicitly held that exclusion of pregnancy and pregnancy-related disabilities from a general disability program does amount to unlawful sex discrimination in violation of Title VII.[14]

In *Geduldig* this Court held that the exclusion of pregnancy and pregnancy-related disabilities from a state-run program of employment disability insurance for private employees does not violate the Fourteenth Amendment by invidiously discriminating against women.

As the court of appeals decisions distinguishing *Geduldig* have noted, questions arising in the social welfare context[15] under the Fourteenth Amendment differ significantly from the issue of statutory construction involved here. The Fourteenth Amendment does not prohibit a policy which, while treating people differently, is reasonably related to a legitimate state interest. In order to prevail a challenger has the burden of showing that the classification is not ra-

determining discrimination the court in dictum discusses *Geduldig* and indicates its concurrence with the other circuits that *Geduldig* does not govern a Title VII claim of discrimination regarding the differential treatment of pregnancy disability. See also *Holthaus* v. *Compton & Sons, Inc.*, 514 F.2d 651 (C.A. 8), which implicitly finds the *Geduldig* decision inapplicable in a Title VII context.

[14] Congress has also given the question attention since this Court's decision in *Geduldig*. See pp. 24–26, *infra*.

[15] The principal cases relied on in this Court's opinion in *Geduldig* specifically emphasize the fact that they deal with social welfare legislation. See *Jefferson* v. *Hackney*, 406 U.S. 535, 546–547; *Dandridge* v. *Williams*, 397 U.S. 471, 485; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489.

tionally related to a legitimate state policy, or that it is invidious.

Title VII on the other hand is directed not only to deliberate or irrational acts of employment discrimination. Under Title VII, a practice which is neutral on its face and is not either irrational or a pretext for discrimination is nevertheless discriminatory if it has a substantial disparate effect on a protected class. See p. 17, *supra*, and cases there cited. See also *Wallace* v. *Debron Corp.*, 494 F. 2d 674 (C.A. 8); *Gregory* v. *Litton Systems, Inc.*, 472 F. 2d 631 (C.A. 9).

Indeed, this Court in *Geduldig* specifically relied (417 U.S. at 495) on the proposition "that, consistently with the Equal Protection Clause, a State 'may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . .' *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 * * *." But, in contrast to the state legislation at issue in *Geduldig* and in *Williamson*, Congress in Title VII took the broad view that all forms of employment discrimination—on the basis of race, sex, religion and national origin—should be abolished. Congress, in other words, decided to cover the field comprehensively rather than take one step at a time.

That Title VII standards are more stringent than the rational basis standard under the Fourteenth Amendment is well recognized, both by Congress and the courts. The extension of coverage to the states as

employers in the 1972 amendments to Title VII represented an at least implicit recognition by Congress that Fourteenth Amendment standards, to which the states were already subject as employers, are in some respects less exacting than Title VII standards.

And, in several factual contexts, the differences between Title VII and Fourteenth Amendment standards have been found by the courts to require different legal results. State protective labor laws restricting the weight women can lift, the hours women can work, or other conditions of women's employment, have traditionally been upheld under the Fourteenth Amendment as permissible regulation of the public health and safety.[16] Under Title VII, however, state maximum-hour and weight-lifting laws for women, which have the effect of limiting their employment opportunity, have uniformly been struck down. *Weeks* v. *Southern Bell Tel. & Tel. Co., supra; Rosenfeld* v. *Southern Pacific Company, supra.* Similarly, in *Goesaert* v. *Cleary*, 335 U.S. 464, the Court upheld, against an Equal Protection attack, a state law restricting employment opportunity in bartending to women who were the wives or daughters of male bar

[16] In *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 398, in upholding a state minimum wage law for women as protective legislation, the Court stated:

"[T]imes without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

owners. A contrary result was reached under Title VII since it could not be shown that male sex was a bona fide occupational qualification necessary to the performance of the job. *Krause* v. *Sacramento Inn*, 479 F. 2d 988 (C.A. 9).[17]

In short, as the courts of appeals have unanimously held, the fact that a policy has been held not to violate the Fourteenth Amendment is not a holding that it does not violate Title VII. Accordingly, the *prima facie* cases of statutory violation shown here (see point IA, *supra*) stand unrebutted by petitioners' reliance on *Geduldig*.

C. GUIDELINES ISSUED BY THE RESPONSIBLE ADMINISTRATIVE AGENCY PROPERLY INTERPRET TITLE VII TO PROHIBIT THE EXCLUSION OF PREGNANCY-RELATED DISABILITY FROM AN OTHERWISE COMPREHENSIVE DISABILITY BENEFITS PLAN

The Equal Employment Opportunity Commission sex discrimination guidelines, 29 C.F.R. 1604.9 and 1604.10, explicitly provide that disabilities caused by pregnancy are, for purposes of disability insurance plans, to be treated as are all other temporary disabilities. 29 C.F.R. 1604.10(b).[18] The courts of appeals in both *Gilbert* and *Wetzel* relied on the guidelines, indicating that they are entitled to "great deference" (*Wetzel*, 511 F. 2d at 204; *Gilbert*, Jt. Supp. Pet. at

[17] See also *Kotch* v. *Board of River Pilot Commissioners*, 330 U.S. 552; *Tyler* v. *Vickery*, 517 F. 2d 1089 (C.A. 5); *Smith* v. *Troyan*, 520 F. 2d 492 (C.A. 6), petition for a writ of certiorari pending, No. 75-734.

[18] The EEOC Guidelines are set forth in the Appendix, *infra*, p. 33.

5a, n. 12). This Court has consistently paid such deference to guidelines properly issued by federal agencies given the responsibility for their promulgation. See, *e.g. Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 431; *Griggs* v. *Duke Power Co., supra.*, 401 U.S. at 433–434; *Udall* v. *Tallman*, 380 U.S. 1.

Petitioner GE contends that the EEOC Guidelines are not entitled to judicial deference because they were not issued contemporaneously with the congressional statute they interpret, and because EEOC has, in the past, taken an assertedly contrary view. While there are circumstances in which such guidelines may not be entitled to judicial deference, see, *e.g., Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, this is not a case in which the guidelines are inconsistent with an obvious congressional intent.[19] Further, this Court, in *Espinoza*, did not state that simply because a guideline is not issued contemporaneously with a statute, or because an agency changes its position on an issue, the guideline is due no deference. To the contrary, the Court in *Espinoza* specifically noted that the Commission had changed its position on the issue involved

[19] In *Espinoza*, this Court held that the term "national origin" in Title VII did not prohibit discrimination on the basis of an individual's status as an alien. The EEOC guideline had interpreted the term "national origin" to include discrimination on the basis of citizenship. The Court held that this guideline was not valid if it meant that there could be no discrimination on the basis of citizenship alone, but that it could be valid in situations where a citizenship requirement would have the effect of discrimination on the basis of national origin, a problem not presented in *Espinoza*. See 414 U.S. at 93.

there and stated that "[t]he Commission's more recent interpretation of the statute in the guideline * * * is no doubt entitled to great deference" (414 U.S. at 94) while holding that it must nonetheless be rejected because of what the Court found to be "an obvious congressional intent" to the contrary (*ibid.*).[20]

Here, not only is there no indication of a legislative intent contrary to the Commission's guidelines in the legislative history of Title VII,[21] there is also some recent indication that Congress does not disagree with that interpretation. This results from the fact that Congress recently had the opportunity to review closely analogous guidelines promulgated by the Department of Health, Education, and Welfare. Those

[20] In addition, the Court in *Espinoza* found some federal employment practices to be in conflict with the EEOC guideline discussed in that case. 414 U.S. at 89–90. In the present case, federal pregnancy leave practices are fully consistent with the guideline at issue here. See p. 3, n. 1, *supra*.

The Office of Federal Contract Compliance of the Department of Labor has issued guidelines concerning sex discrimination by federal contractors, which state that, in the area of contributions to insurance plans, an employer is not in violation of the guidelines if his contributions are the same for both sexes, or if the resulting benefits are equal. 41 C.F.R. 60–20.3(c). However, more recent proposed guidelines published, but not yet adopted, by OFCC state that pregnancy and pregnancy-related disabilities must, under an employer's insurance plan or sick leave policy, be treated as a temporary disability, subject to the same treatment as all other temporary disabilities. 38 Fed. Reg. 35338.

[21] The excerpts from the legislative history of the proposed Equal Rights Amendment quoted by petitioner GE (Br. 37–41) do not purport to interpret Title VII and do not discuss the question of pregnancy coverage in disability insurance plans.

regulations (45 C.F.R. Part 86, as added, 40 Fed Reg. 24128), which deal with the issue of sex discrimination in federally assisted educational institutions, were promulgated at the direction of Congress, see Title IX of the Education Amendments of 1972, 20 U.S.C. (Supp. II) 1681, and signed by the President. The underlying statute, with exceptions not here relevant, provides in pertinent part that (20 U.S.C. (Supp. II) 1681(a)):

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program activity receiving Federal financial assistance * * *.

Section 86.57(c) of the Regulations (40 Fed. Reg. 24144) adopted to implement this provision specifically states:

> (c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

This regulation is essentially similar to the EEOC guideline (Appendix, *infra*) at issue in this case. Accordingly, if the HEW guideline and, similarly, the EEOC guideline were in conflict with congressional intent, Congress had the opportunity to so indicate by withholding its approval of the HEW guideline, for, in the Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484, Congress required that any regulations implementing Title IX be submitted to both Houses for a review period of forty-five days prior to their implementation.[22]

There is, in sum, no reason to believe that the EEOC guideline at issue here is inconsistent with congressional intent, and the courts below accordingly did not err in relying on it.

II

THE BUSINESS CONSIDERATIONS PROFFERED BY PETITIONERS DO NOT PROVIDE SUFFICIENT JUSTIFICATION TO OVERCOME THE *PRIMA FACIE* VIOLATION OF TITLE VII

Petitioners in both cases offer several considerations to justify the exclusion of pregnancy disability from their plans. Both state that they advert to such "con-

[22] Several members of the House indicated that their review of the HEW regulations would be for the purpose of determining whether any of those regulations would be "inconsistent with the law." See 120 Cong. Rec. H12332–12334 (daily ed. Dec. 19, 1974). The pregnancy regulations were brought to the attention of the Senate by Senator Helms (121 Cong. Rec. S9714–9715 (daily ed. June 5, 1975)) and a resolution of disapproval was introduced by him, but no action was taken on the resolution.

siderations" in order to disprove any intent on their behalf to discriminate against women (see Br. of Lib. Mut. at 15–20; Br. of GE at 53–61). However, as stated above (see pp. 11, 17, 20, *supra*), proof of discriminatory intent is not prerequisite to demonstrating a *prima facie* violation of Title VII.

Under Title VII, an employer may rebut a *prima facie* case in a variety of ways. See, *e.g.*, *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 431. In *Robinson* v. *Lorillard Corp*, 444 F. 2d 791 (C.A. 4), the court articulated as follows the standard for measuring an employer's business justification for a practice which has been found to deny employment benefits to a class of individuals protected by Title VII (*id.* at 798):

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business.

Here, however, no issue of safety or efficient operation of the employer's primary business is involved, and the issue of cost is the only possible defense. The court's opinion in *Lorillard* and the relevant EEOC guideline (see 29 C.F.R. 1604.9(e)) indicate that a showing of increased cost generally is an insufficient defense to a *prima facie* violation of Title VII.[23] At the very least, we submit, the inquiry in the present

[23] See also *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (C.A. 10), certiorari denied, 401 U.S. 954; *United States* v. *St. Louis-San Francisco Ry. Co.*, 464 F. 2d 301 (C.A. 8), certiorari denied, 409 U.S. 1107.

circumstances should be whether the adjustment necessary to eliminate the discriminatory effect of the practice would be so financially burdensome as to jeopardize the entire benefit plan.[24]

In support of their contentions that business considerations militate against extension of disability benefits to women, petitioners offer the following reasons, none of which, in our judgment, suffice to rebut the violation demonstrated.

1. Both petitioners suggest that the "voluntary" aspect of pregnancy justifies the exclusion of pregnancy-related disability from their plans. As stated above (see p. 12, n. 9, *supra*), we note that this distinction, insofar as it has any validity, has been applied only to a disability which occurs solely in women and not to other voluntary disabilities. Also, the actual disability suffered (see I App. 329–330, 362 (testimony of Dr. Forrest), II App. 514 (testimony of Dr. Hellegers)) is like all others covered by the plans in that it generally includes hospitalization for some time and a further period of recuperation.

Similarly, GE states (Br. 55) that the plan's benefits are "intended to soften the blow to employees of an unintended and unexpected sickness or accident" and attempts to distinguish pregnancy on this ground. However, the GE plan does cover other "expected" illnesses (II App. 647–648) and does not cover unexpected complications of pregnancy.

---

[24] See also *Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (C.A. 5); *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 662 (C.A. 2).

Both GE (Br. 56) and Liberty Mutual (Br. 19) state that, due to their belief that a high percentage of women do not return to work following childbirth, pregnancy disability benefits would be a form of "severance pay," a type of benefit not intended by the program. However, there is no indication that when an employee under the existing plans fails to return to work after an absence due to disability, the company seeks to retrieve the money paid so that no "severance pay" is disbursed under the guise of disability benefits.

2. Petitioner GE also states that payment for pregnancy disability would encourage women to leave work earlier and return later than if pregnancy disability were not covered (Br. 56). This absence from employment, the petitioner asserts, would be predicated on the well being of the child, particularly in the period following delivery (*ibid.*).

This contention ignores the fact that it is only the treatment of pregnancy disability which is at issue in these cases. The decisions below do not require an employer to grant a woman leave before disability is suffered, or following recovery from disability; any non-disability leave would be granted by the employer regardless of the outcome of the issue presented here. The precise period of actual disability which would have to be covered by the plans would be determined as it is for all other disabilities—by medical verification, and petitioners offered no evidence to indicate that a requirement of medical verification would be less effective when determining the period of

pregnancy disability than for any other condition covered by the plan.[25]

GE's concern that providing women pregnancy disability leave will lead to a demand by men for paid child-care leave is similarly unfounded. The payment of disability benefits for pregnant women would depend on proof of actual disability.[26] Men requesting child-care leave are, of course, suffering no disability. Any such request by men could be made only when an employer permits women to obtain leave, for child-care purposes, beyond their recovery. (Of course, since the women are, at that point, not disabled, they are not entitled to disability benefits.) To the extent that an employer allows women employees such "child care" leave, the employer may be obligated to provide it to men. See *Danielson* v. *Board of Higher Education*, 358 F. Supp. 22 (S.D. N.Y.); 29 C.F.R. 1604.9(b). However, the court of appeals decisions

[25] The GE plan states that "to collect these [disability] benefits, you must be under the care of a physician for the treatment of your disability and your claim must be certified by a physician" (III App. 1065). See also III App. 1097. Medical testimony at the *Gilbert* trial indicated that it is no easier for one to falsify disability following pregnancy than it would be for one following recovery from any other disability (I App. 337–338; II App. 476), and there was some indication that recovery from pregnancy is easier to determine medically than recovery from some other disabilities. GE's actuary stated that GE's prediction of malingering and claim abuse by women was not based on actual evidence concerning pregnancy, but that malingering and claim abuse was a "general problem" (II App. 535). Accordingly, GE did not demonstrate that claim abuse would be a greater problem for pregnancy disability than for any other disability.

[26] See p. 29, n. 25 *supra*.

in the present cases in no way require employers to grant such non-disability, child-care leave to either women or men, and in no way suggest that leave of this type must be compensated from a disability insurance plan.

3. Petitioner GE introduced some evidence concerning the increased cost of pregnancy coverage. However, that evidence is based on a critical misconception. The evidence introduced at the trial indicated that, on the average, a woman's actual pregnancy-related disability was for a period of six weeks; in other words, that doctors normally checked a woman six weeks after childbirth on the basis that, if no problems had developed, a woman would be fully recovered by that time (I App. 329–330; II App. 465, 500); and medical testimony at the trial indicated that, in many instances, women could recover in as little as two or three weeks following delivery (I App. 330; II App. 466). Medical testimony also indicated that, in most instances where there had been no complication, actual disability did not occur until actual labor and delivery (I App. 321; II App. 460).

The GE actuary who testified (see GE Br. 8, 58) to the estimated increase in benefits paid nationwide, if pregnancy disability were reimbursed, based his calculation on the following presumed duration of pregnancy-related absences: 13 weeks under plans paying benefits for 13 weeks; 23 weeks for plans paying benefits for 26 weeks, and 30 weeks for plans paying benefits for 52 weeks. (See III App. 847, GE Ex. 42.)

This ignored the fact that the average actual period of *disability*, which is the only basis for entitlement to payment, was proved at trial to be *six* weeks, not thirteen, twenty-three, or thirty. For this reason, the figures presented by GE are not accurate when increased cost of covering pregnancy disability is to be considered.[27]

In addition to this erroneous basis, the figures provided by GE referred to nationwide cost, not the cost to GE. Accordingly, the figures do not indicate the extent of the financial effect that the relief requested would have on the disability insurance plans and, hence, certainly do not suffice to establish a business necessity defense to the *prima facie* violation of Title VII demonstrated by the plaintiffs.

---

[27] In fact, these figures were based on leaves taken when no medical proof of disability was required (II App. 563).

CONCLUSION

For the foregoing reasons, the judgments below should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
J. STANLEY POTTINGER,
Assistant Attorney General.
BRIAN K. LANDSBERG,
WALTER W. BARNETT,
MARK L. GROSS,
Attorneys.

ABNER W. SIBAL,
General Counsel,
JOSEPH T. EDDINS,
Associate General Counsel,
BEATRICE ROSENBERG,
LINDA COLVARD DORIAN,
BETH L. DON,
Attorneys,
Equal Employment Opportunity Commission.

JANUARY 1976.

APPENDIX

EEOC GUIDELINES

29 C.F.R. 1604.9. Fringe benefits:

* * * * *

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

* * * * *

29 C.F.R. 1604.10. Employment policies relating to pregnancy and childbirth:

* * * * *

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1976

Supreme Court, U. S.
FILED
SEP 26 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY, A Corporation,

Petitioner,

—v.—

SANDRA WETZEL and MARI ROSS, on behalf of themselves and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE* OF AMERICAN CIVIL LIBERTIES UNION AND NATIONAL EDUCATION ASSOCIATION

RUTH BADER GINSBURG
MELVIN L. WULF
KATHLEEN WILLERT PERATIS
SUSAN C. ROSS
EVE CARY
HELENE BURGESS

DAVID RUBIN
JOEL D. GEWIRTZ

National Education Association
1201 16th Street, N.W.
Washington, D.C. 20036

American Civil Liberties Union
22 East 40th Street
New York, New York 10016

Attorneys for Amici Curiae

INDEX

PAGE

Interest of Amici 1

Opinions Below 3

Statute Involved 4

Question Presented 4

Statement of the Case 5

Summary of Argument 8

ARGUMENT:

I. Title VII of the Civil Rights Act of 1964 bars an employer from maintaining a comprehensive disability income protection plan that excludes women workers disabled by pregnancy, childbirth and related conditions 12

A. Denying Benefits to a Sub-Class of Disabled Women Workers—Those Workers Disabled by Pregnancy, Childbirth and Related Conditions—Constitutes a *Per Se* Sex Classification Prohibited by Section 703(a) of Title VII. To Hold Otherwise Would Reverse a Major Area of Title VII Law Now Secured by a Large Body of Well-Reasoned Decisions 12

PAGE

B. This Court Should Give "Great Deference" to the EEOC Guidelines That the Denial of Disability Benefits to Women Disabled by Pregnancy and Related Conditions Constitutes a Prohibited Sex Classification, as Has Every Court of Appeals to Consider the Issue 21

C. Giving "Great Deference" to the EEOC Guidelines on Pregnancy-Related Disabilities Is Impelled by Congress' Action on Regulations Virtually Identical to the EEOC Guidelines and by the Legislative History of Title VII 29

D. Petitioner's Exclusion of Pregnancy-Related Disabilities From Its Disability Income Protection Plan, Even If Not Assessed as a *Per Se* Sex Classification, Would Be Prohibited Under Section 703(a) as a Neutral Policy With a Disparate Impact on Women Workers 35

E. Liberty Mutual Has Not Asserted or Proved a Defense to Its Violation of Section 703(a) 37

II. The rigorous standard of Title VII, not the traditional constitutional standard applied in *Geduldig* v. *Aiello,* is controlling in this case 47

A. Six United States Courts of Appeals and an Array of State Authorities, Distinguishing Legislative Anti-Discrimination Requirements From Fourteenth Amendment Limitations, Have Declared *Aiello* Inapposite to the Issue Here in Controversy 47

PAGE

B. The Constitutional Equal Protection Standard Applied to Social Welfare Programs Has No Bearing on Title VII Analysis 51

C. The Standard of Review in Equal Protection Sex Discrimination Cases Is Less Stringent Than the Standard Applicable Under Title VII to Both Race and Sex Discrimination 52

D. Legislation Enacted Pursuant to the Commerce Clause or Section Five of the Fourteenth Amendment May Reach Further Than Practices Prohibited by the Equal Protection Clause 55

Conclusion 58

TABLE OF AUTHORITIES

Cases:

Albemarle Paper Co. v. *Moody,* 95 S. Ct. 2362 (1975) .. 22

Andrews v. *Drew Municipal Separate School District,* 371 F. Supp. 27 (N.D. Miss. 1973), *aff'd on other grounds,* 507 F. 2d 611 (5th Cir. 1975) 36

Armbruster v. *Crouse-Irving Memorial Hospital,* Case No. CS-28495-72, App. No. 2104 (1975) (unpublished), *appeal pending,* N.Y. App. Div. 50

PAGE

Bartmess v. *Drewrys U.S.A., Inc.*, 444 F. 2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971) 23, 24
Board of Education, City of New York v. *Division of Human Rights*, 35 N.Y. 2d 675, 319 N.E. 2d 203, 360 N.Y.S. 2d 887 (1974) 49
Board of Education, East Williston v. *Division of Human Rights*, 35 N.Y. 2d 673, 319 N.E. 2d 202, 345 N.Y.S. 2d 93 (1974) 49
Bowe v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969) 40, 51

Cleveland Board of Education v. *LaFleur*, 414 U.S. 632 (1974) 16, 21, 48
Communication Workers of America v. *American Telephone & Telegraph Co.*, 513 F. 2d 1024 (2d Cir. 1975) 15, 23, 39, 48, 56, 57

Dandridge v. *Williams*, 397 U.S. 471 (1970) 51
Danner v. *Phillips Petroleum Co.*, 447 F. 2d 159 (5th Cir. 1971) 36, 51
Diaz v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) 40, 51
Doe v. *Osteopathic Hospital*, —— F. Supp ——, 3 FEP Cases 1128 (D. Kan. 1971) 16

Espinoza v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973) 30, 31, 50

Frontiero v. *Richardson*, 411 U.S. 677 (1973) 53

Garneau v. *Raytheon Co.*, 323 F. Supp. 391 (D. Mass. 1971) 53

PAGE

Geduldig v. *Aiello*, 417 U.S. 484 (1974) .....*passim*
Gilbert v. *General Electric Co.*, —— F. 2d ——, 10 FEP Cases 1201 (4th Cir. 1975) 23, 47
Goesaert v. *Cleary*, 335 U.S. 464 (1948) 52
Green v. *Waterford Board of Education*, 473 F. 2d 629 (2d Cir. 1973) 16, 20
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) ....*passim*

Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 56
Hodgson v. *Security National Bank*, 460 F. 2d 57 (8th Cir. 1972) 17
Holthaus v. *Compton & Sons, Inc.*, 514 F. 2d 651 (8th Cir. 1975) 15, 16, 19, 23, 47
Hutchison v. *Lake Oswego School District*, —— F. 2d ——, Nos. 74-3181, 3182 (9th Cir. July 21, 1975) 22, 23, 39, 47

In re Josephine Frigale, 2 CCH E.P.G. ¶5212 (Ill. Fair Employment Practices Comm'n, Jan. 16, 1973) 50

Jefferson v. *Hackney*, 406 U.S. 535 (1972) 51
Johnson v. *Pike Corp. of America*, 332 F. Supp. 490 (C.D. Cal. 1971) 42

Kahn v. *Shevin*, 416 U.S. 351 (1974) 51, 52
Katzenbach v. *McClung*, 379 U.S. 294 (1964) 56

Local 186, Pulp Workers v. *Minnesota Mining & Manufacturing Co.*, 304 F. Supp. 1284 (N.D. Ind. 1969) .. 54
Local 189, United Papermakers v. *United States*, 416 F. 2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) 27, 28

PAGE

Manhart v. *City of Los Angeles,* —— F. Supp. ——, 10 FEP Cases 101 (C.D. Cal. 1975) 39
McCrimmon v. *Daley,* 418 F. 2d 366 (7th Cir. 1969) .. 52
McDonnell Douglas Corp. v. *Green,* 411 U.S. 792 (1973) 28
Meadows v. *Ford Motor Co.,* 62 F.R.D. 98, 101 (W.D. Ky. 1973), *modified and aff'd on other grounds,* 510 F. 2d 939 (6th Cir. 1975) 35, 36
Mengelkoch v. *Industrial Welfare Commission,* 442 F. 2d 1119 (9th Cir. 1971) 24, 52
Muller v. *Oregon,* 208 U.S. 412 (1908) 24, 52

NLRB v. *Fainblatt,* 306 U.S. 601 (1939) 56
NLRB v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937) 55, 56

Phillips v. *Martin Marietta Corp.,* 400 U.S. 542 (1971), *rev'g* 411 F. 2d 1 (5th Cir. 1969) 12, 13, 14, 17, 22, 37
Phillips v. *Martin Marietta Corp.,* 416 F. 2d 1257 (5th Cir.), *denying rehearing in* 411 F. 2d 1 (5th Cir. 1969) 33

Radice v. *New York,* 264 U.S. 292 (1924) 52
Reidel v. *Wisconsin Department of Employe* [*sic*] *Trust Funds,* 2 CCH E.P.G. ¶5211 (Wisc. Dept. Hum. Rel. Jan. 2, 1974) 50
Richards v. *Griffith Rubber Mills,* 300 F. Supp. 338 (D. Ore. 1969) 53
Robinson v. *Lorillard Corp.,* 444 F. 2d 791 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971) 40, 41, 42, 51
Rose v. *Bridgeport Brass Co.,* 487 F. 2d 804 (7th Cir. 1973) 35

PAGE

Rosen v. *Public Service Electric & Gas Co.,* 477 F. 2d 90 (3d Cir. 1973) 24
Rosen v. *Public Service Electric & Gas Co.,* 409 F. 2d 775 (3d Cir. 1969) 53, 54
Rosenfeld v. *Southern Pacific Co.,* 414 F. 2d 1219 (9th Cir. 1971) 24, 39, 40, 51, 52, 53

Sail'er Inn, Inc. v. *Kirby,* 5 Cal. 3d 1, 485 P. 2d 529, 95 Cal. Rptr. 329 (1971) 52
Satty v. *Nashville Gas Co.,* —— F. 2d ——, 11 FEP Cases 1 (6th Cir. 1975) 15, 22, 47, 56
Schlesinger v. *Ballard,* 95 S. Ct. 572 (1975) 52
Smith v. *Troyan,* —— F. 2d ——, 10 FEP Cases 1380 (6th Cir. 1975) 41
Sprogis v. *United Air Lines, Inc.,* 444 F. 2d 1194 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971) 14, 15, 17, 27, 39

Taylor v. *Louisiana,* 95 S. Ct. 692 (1975) 18
Truitt v. *Stromberg Carlson Corp.,* Case No. CSF-27162-72 (N.Y. State Division of Human Rights, June 26, 1975) 16
Tyler v. *Vickery,* 517 F. 2d 1089 (5th Cir. 1975) 48, 52

Union Free School District No. 6 v. *New York State Human Rights Appeal Board,* 35 N.Y. 2d 371, 320 N.E. 2d 859, 362 N.Y.S. 2d 139 (1974) 48, 49, 50
United States v. *Bethlehem Steel Corp.,* 446 F. 2d 652 (2d Cir. 1971) 42, 51
United States v. *Darby,* 312 U.S. 100 (1941) 56
United States v. *Georgia Power Co.,* 474 F. 2d 906 (5th Cir. 1973) 53

PAGE

Vineyard v. *Hollister Elementary School District*, —— F. Supp. ——, 8 FEP Cases 1009 (N.D. Cal. 1974) 15

Weeks v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228 (5th Cir. 1969) 39, 40
Weinberger v. *Salfi*, 95 S. Ct. 2457 (1975) 51
West Coast Hotel Co. v. *Parrish*, 300 U.S. 379 (1937) 52
Wetzel v. *Liberty Mutual Insurance Co.*, 372 F. Supp. 1146, 1163 (W.D. Pa. 1974), *aff'd* 508 F. 2d 239 (3d Cir.), *cert. denied*, 43 U.S.L.W. 3644 (U.S. June 9, 1975) 3, 5, 7, 8, 27, 37, 45
Wetzel v. *Liberty Mutual Insurance Co.*, 511 F. 2d 199 (3d Cir.), *cert. granted*, 44 U.S.L.W. 3038 (U.S. May 27, 1975) 3, 8, 17, 23, 37, 48

Constitutional Provisions:

United States Constitution
Commerce Clause 11, 55, 56
Fourteenth Amendment ..... *passim*

Federal Statutes, Proposed Legislation, Executive Orders:

Civil Rights Act of 1964, Title II 56
Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e *et seq.* (1974) ..... *passim*

Education Amendments of 1972, Title IX, 20 U.S.C. §1681 *et seq.* (1974) 9, 29, 30
Equal Employment Opportunity Act of 1972, 86 Stat. 103 .....33, 54
Equal Pay Act of 1963, 29 U.S.C. §206(d) (1970) 32

PAGE

Administrative Regulations, Proposed Regulations, Opinions:

CCH EEOC Decisions (1973) 28

Dept. of Health, Education and Welfare, Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefitting from Federal Financial Assistance, §86.57(c), 40 Fed. Reg. 24144 .....29, 30, 31
Equal Employment Opportunity Commission, Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333 .....23, 24
Equal Employment Opportunity Commission, Procedural Regulations, 29 C.F.R. §§1604.29, 1604.30 27
Equal Employment Opportunity Commission, Sex Discrimination Guidelines, 29 C.F.R. §§1604.1-1604.10 .....*passim*

Maryland Sex Discrimination Guidelines, §8(b), 3 CCH E.P.G. ¶23,820.08 (1972) 50

Office of Federal Contract Compliance, Sex Discrimination Guidelines for Government Contractors, 41 C.F.R. §60-20 (1973) 26
Office of Federal Contract Compliance, Sex Discrimination Guidelines, Proposed 41 C.F.R. §60-20.3(h)(2), 38 Fed. Reg. 35336, 35338 26

Other Authorities Cited:

Babcock, Freedman, Norton & Ross, Sex Discrimination and the Law: Causes and Remedies (1975) 54

PAGE

Berger, Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women, 5 Valparaiso U. L. Rev. 326 (1971) 32

Brown, Emerson, Falk & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L. J. 871, 932 (1971) 35

Comment, Love's Labors Lost: New Conceptions of Maternity Leaves, 7 Harv. Civ. Rights—Civ. Lib. L. Rev. 260 (1972) 20, 28

Hayden, Punishing Pregnancy: Discrimination in Education, Employment and Credit, Women's Rights Project, American Civil Liberties Union (October, 1973) 19, 44, 45

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971) ..25, 33, 34, 35, 54

Joint Appendix, *Gilbert* v. *General Electric Co.*, —— F. 2d ——, 10 FEP Cases 1201 (4th Cir. 1975) 25

Koontz, Childbirth and Child Rearing Leave: Job-Related Benefits, 17 N.Y. L. Forum 480 (1971) ..20, 26, 44

Margolin, Equal Pay and Equal Employment Opportunities for Women, 19 N.Y.U. Conf. on Lab. 297 (1966) 32

National Woman's Party, Bulletin of Feb. 10, 1964 .. 32

118 Cong. Rec. 9097 (1972) 35

109 Cong. Rec. 2888-89, 8914, 8916, 9199-200, 9201-02, 9211-12 (1963) 32

110 Cong. Rec. 1528, 2577-84, 7202-12, 8452-56 (1964) ..32, 55

Policy Statement on Pregnancy-Related Disabilities, American College of Obstetricians and Gynecologists 43

PAGE

Reports of the Advisory Council on Social Security (1975) 46, 47

S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971) 25, 35, 54

Supplemental Brief of Appellees, *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) 44

XXI Cong. Q. No. 24, 978 (June 14, 1963) (remarks of President Kennedy) 33

United States Bureau of the Census, Female Family Heads (Series p. 23, Report #50 1974) 18

United States Comm'n on Civil Rights, Women and Poverty (1974) 18

United States Dept. of Health, Education and Welfare, Public Health Service, Current Estimates From the Health Interview Survey, United States—1968 (Vital and Health Stats. Series 10, No. 60) 46

United States Dept. of Labor, Bureau of Labor Statistics, Summary—Special Labor Force Report, August, 1974, Marital and Family Characteristics of Workers, March, 1974 18

United States Dept. of Labor, Women's Bureau, Why Women Work (Rev. ed. 1975) 18, 46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY, A Corporation,

Petitioner,

—v.—

SANDRA WETZEL and MARI ROSS, on behalf of themselves and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE*

Interest of *Amici*[1]

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that confinement of women's opportunities is a pervasive problem at all levels of society, public and private, the American Civil Liberties Union has established a Women's Rights Project to work towards the elimination of gender-based discrimination.

---

[1] This brief is filed with consent of the parties. The letters of consent for the American Civil Liberties Union are filed herewith. The letters of consent for the National Education Association will be filed separately.

The American Civil Liberties Union believes that this case, concerning the Title VII rights of work force members disabled due to pregnancy, poses an issue of great significance to the achievement of full equality between the sexes.

Lawyers for the American Civil Liberties Union have participated in a number of cases involving government and employer rules subjecting women who bear children to disadvantageous treatment. We acted as *amicus curiae* in *Cohen* v. *Chesterfield County School Board* and *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974), which declared inconsistent with due process forced termination of a teacher's employment at a fixed stage of pregnancy, and *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), which upheld, against an equal protection challenge, the exclusion of women disabled by childbirth from a state-operated social insurance program. Lawyers for the American Civil Liberties Union were counsel for the Petitioner in *Struck* v. *Secretary of Defense,* 461 F. 2d 1372 (9th Cir. 1971, 1972), *cert. granted,* 409 U.S. 947, *judgment vacated and case remanded for consideration of mootness,* 409 U.S. 1071 (1972), which challenged the Air Force discharge of Captain Struck for pregnancy.

With regard to sex-based discrimination generally, lawyers for the American Civil Liberties Union presented the appeal in *Reed* v. *Reed,* 404 U.S. 71 (1971), participated as counsel for the appellants and later as *amicus curiae* in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), represented the appellant in *Kahn* v. *Shevin,* 416 U.S. 351 (1974), and the appellees in *Edwards* v. *Healy,* 95 S. Ct. 2410 (1975), and *Weinberger* v. *Wiesenfeld,* 95 S. Ct. 1223 (1975).

The National Education Association (NEA) is a non-profit corporation founded in 1857 and chartered by an act of Congress in 1906. NEA is an independent, voluntary organization of educators consisting of 1.7 million members. It is the largest professional organization in the nation. NEA has long been concerned with the elimination of discrimination on the basis of sex in education and employment. It has provided financial support to many teachers in litigation, brought under federal statutes and constitutional provisions, contesting pregnancy-based distinctions and filed an *amicus curiae* brief with this Court in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974), which presented the issue of the constitutionality of a school board's mandatory maternity leave rule.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit, affirming a judgment declaring violative of Title VII Petitioner-employer's exclusion of pregnancy-related disability from its disability income protection plan, is reported at 511 F. 2d 199 (1975). The opinion of the District Court for the Western District of Pennsylvania is reported at 372 F. Supp. 1146 (1974) and its memorandum order denying Petitioner's motion for reconsideration is reported at 372 F. Supp. 1163 (1974). Copies of these opinions are set out in the appendix to the petition for a writ of certiorari at pages 2-18, 19-48, and 49-51 respectively.

Statute Involved

Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) (1974) (hereinafter "Title VII"), in pertinent part provides:

> Sec. 703. (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .

Question Presented

Whether the denial of insurance benefits to the class of women workers disabled by pregnancy, childbirth and related conditions under a comprehensive disability income protection plan violates Title VII.

Statement of the Case

Respondents Sandra Wetzel and Mari Ross commenced this class action under Title VII of the 1964 Civil Rights Act on February 28, 1972. They sought relief against Petitioner Liberty Mutual Insurance Company's policies providing that women workers disabled by pregnancy, childbirth and related conditions were not entitled to benefits under the company's disability income protection plan and that such women, unlike other disabled workers, would be fired if they failed to return to work within a specified time period. In the same action, Wetzel and Ross attacked as sex discriminatory the company's recruitment, hiring, promotion and pay policies. They charged that the company sex-segregated both entry-level jobs and promotion lines in its Claims Department, to the marked economic disadvantage of its women workers. As to all these charges, except for the as yet unresolved pay issue, the company was found to have discriminated against its women workers in violation of Title VII. *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239 (3d Cir.), *cert. denied*, 43 U.S.L.W. 3644 (U.S. June 9, 1975).

The company's policies relating to pregnancy, like its sex-segregation policies, deprived women employees of both work and money. Until September, 1970, more than six years after passage of Title VII, Liberty Mutual fired pregnant women. In that year, it changed the policy to allow pregnant women a choice between being fired or taking an unpaid leave of absence at the end of the eighth month, returning to work within six months of the leave date or three months of the delivery date, whichever came first. Liberty Mutual further amended the policy in November, 1971, to

allow pregnant women to remain on the job for as long as they were physically able to perform the work. However, it continued to fire women if they did not return to work within the specified time period, even if they remained disabled. This automatic firing provision does not apply to employees disabled for any other reason. The company asserted its right to retain this latter policy through its appeal to the Third Circuit, but has abandoned that argument before this Court.

Liberty Mutual maintains a comprehensive disability income protection plan providing a percentage of salary to disabled workers while they are disabled. The plan covers virtually all disabilities except those caused by pregnancy, childbirth and related conditions. Disabled male workers receive income protection for every disability caused by conditions unique to the male sex, such as cancer of the prostate gland and vasectomies.

The basic eligibility test under Liberty Mutual's disability income protection plan is whether the disability requires "throughout its continuance the regular attendance of a physician licensed to prescribe and administer all drugs and to perform all surgical procedures." Petitioner's Brief, A3. Women disabled by pregnancy and related conditions plainly meet this test. To remove them from coverage, the plan therefore adds a specific exclusion for "disability due to pregnancy or any cause related to pregnancy." Petitioner's Brief, A3. The only other disabled workers excluded by categories based on the source of the disability are those whose disability stems from "any act of declared or undeclared war, attempted suicide or intentionally self-inflicted injury," Petitioner's Brief, A3; all of these apply

to both men and women. None of these disabilities disproportionately affects men workers, as Petitioner suggests at 19-20 of its Brief. Acts of war affecting Liberty Mutual employees while they are employees, such as a nuclear bombing, would injure both men and women workers equally. Suicides, the subject of the statistics cited by Petitioner (as opposed to *attempted* suicides, whose disabilities are excluded under the plan), would not receive any income protection at all, being dead.

Liberty Mutual also suggests that its plan excludes workers disabled by alcoholism, narcotics addiction, or mental or emotional disorder, Petitioner's Brief, 20, but a careful reading of its plan reveals that this is not so. Instead, a worker disabled by these conditions has the option whether to receive insurance benefits, since he or she can do so simply by enrolling "in a corrective program under the guidance of a licensed physician." Petitioner's Brief, A3.

Time limits applicable to coverage apply equally to all disabilities. Any disabled employee must wait until the eighth day of disability for coverage to start; coverage lasts for 103 weeks for an employee who has worked for Liberty Mutual less than five years; thereafter he or she is covered until age 65.

The District Court, granting partial summary judgment to Respondents, determined that Liberty Mutual's employment policies relating to pregnancy violated Title VII. Liberty Mutual's motion for reconsideration was denied, in part because the company offered no evidence on the cost of extending disability benefits to pregnancy-related disabilities. 372 F. Supp. at 1164. Nor had Liberty Mutual, in opposing summary judgment, presented any evidence

on the duration of pregnancy-related disabilities. 372 F. Supp. at 1162. The sole evidence in the record as to why Petitioner retained either of its policies relating to pregnant women is that Petitioner acted "on advice of counsel." Deposition of Kenneth Spaulding, Manager of Personnel Services, October 17, 1972, Appendix at 36, 43.

In a unanimous decision rendered February 12, 1975, the Third Circuit affirmed the District Court judgment, holding violative of Title VII both Liberty Mutual's termination policy for women physically unable to return to work within the specified time period, and its denial of disability benefits to women disabled by pregnancy, childbirth and related conditions. In its petition to this Court, however, Liberty Mutual seeks to uphold only the exclusion of pregnancy-related disability benefits from disabled women workers.

Summary of Argument

I.

This case concerns the singling out of a sub-class of women workers—those disabled by pregnancy, childbirth and related conditions—for differential treatment under an otherwise comprehensive disability income protection plan. Discrimination against a sub-class of women workers, as this Court has previously held, is a *per se* sex classification prohibited by Section 703(a) of Title VII.

The purpose of Liberty Mutual's disability income protection plan is to replace a portion of the earnings lost when physical disability prevents an employee from working. Women workers disabled by pregnancy, childbirth

and related conditions have the same qualifications for these benefits as disabled men workers. They are unable to work for medically certifiable reasons, and face a loss of income, hospitalization, medical expenses and even the risk of death. The exclusion of pregnancy-related disabilities is plainly sex-based under Title VII, since it affects only women. A holding that this exclusion is not sex-based for Title VII purposes would have a devastating impact upon women in the labor force and would cast doubt upon a broad range of federal court decisions condemning other discriminatory practices against pregnant women.

II.

The interpretative guidelines of the Equal Employment Opportunity Commission (EEOC) prohibit singling out pregnant women for disadvantageous treatment, and focus on the aspects of pregnancy which are relevant to employment decisions. Thus, they require treatment of pregnancy-related disabilities like all other temporary disabilities under disability insurance plans. These guidelines are entitled to "great deference," as six United States Courts of Appeals have held.

Congress has indicated approval of the guidelines in considering and rejecting amendments to the implementing regulations for Title IX of the Education Amendments of 1972. 20 U.S.C. §1681 *et seq.* (1974). These regulations contain provisions relating to pregnancy virtually identical to the guidelines here challenged by Petitioner. This Congressional intent is strengthened by the legislative history of Title VII, indicating determined Congressional support for ending all forms of sex discrimination in the employment sector. The mandate of the EEOC, carried out in

its guidelines, is to root out causes of systemic discrimination against all protected groups. It has done precisely that with regard to women in its sex discrimination guidelines. Thus, EEOC's identification of pregnancy classifications as *per se* sex classifications should be controlling.

III.

If the exclusion of pregnancy-related disabilities is not assessed as a *per se* sex classification under Title VII, it is prohibited as a neutral policy with a disparate impact upon women workers, illegal under the doctrine laid down by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

IV.

Petitioner has not presented or proved any Title VII defense to its practice of discriminating against women disabled by pregnancy, childbirth and related conditions. If Petitioner's discussion of cost is an attempt now to assert either a Section 703(e) ("BFOQ") or business necessity defense, the attempt must fail. First, it comes too late. Second, the "BFOQ" is a defense only to discrimination in "hiring and employing," not to discrimination in fringe benefit plans. Third, cost alone can never meet the standards of the business necessity defense. Finally, Petitioner's cost and statistical presentation is deficient in any case. It is not based on the company's own situation, uses inflated statistics and fails to comprehend that the guidelines allow safeguards against abuse of the plan, so long as they apply equally to all workers.

V.

Petitioner's reliance on *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), must fail, since *Aiello* involved application of the traditional constitutional equal protection standard, not the rigorous Title VII statutory standard applicable here. Six United States Courts of Appeals as well as numerous state decisions have found *Aiello* inapposite to the question presented in this case; they have construed *Aiello* to hold that pregnancy-based classifications are sex-based under the fourteenth amendment, if accompanied by an intent to discriminate, and have recognized that Title VII, in contrast, requires no showing of discriminatory intent. In addition, under Title VII the employer has a heavy burden to justify discriminatory practices, while under the fourteenth amendment standard for social welfare programs, state legislatures are given wide leeway. Nor are constitutional standards for proscribing sex discrimination as strict as those applicable to both race and sex discrimination under Title VII. Finally, *Aiello* is inapposite here because Title VII was passed pursuant to the commerce clause and Section 5 of the fourteenth amendment, both of which permit legislation reaching well beyond the requirements of the equal protection clause.

ARGUMENT

I.

Title VII of the Civil Rights Act of 1964 bars an employer from maintaining a comprehensive disability income protection plan that excludes women workers disabled by pregnancy, childbirth and related conditions.

A. *Denying Benefits to a Sub-Class of Disabled Women Workers—Those Workers Disabled by Pregnancy, Childbirth and Related Conditions—Constitutes a* Per Se *Sex Classification Prohibited by Section 703(a) of Title VII. To Hold Otherwise Would Reverse a Major Area of Title VII Law Now Secured by a Large Body of Well-Reasoned Decisions.*

This case concerns the singling out of a sub-class of women workers—those disabled by pregnancy, childbirth and related conditions—for differential treatment in a fringe benefit program. This Court has dealt dispositively with the legality under Section 703(a) of Title VII, 42 U.S.C. §2000e-2(a) (1974), of singling out a sub-class of women workers for differential treatment. In its first decision construing Title VII, the Court reversed a Fifth Circuit ruling that Section 703(a) allowed an employer to refuse to hire mothers of pre-school age children. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971), *rev'g* 411 F. 2d 1 (5th Cir. 1969). This Court held:

> Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school age children.

400 U.S. 542. Petitioner Liberty Mutual Insurance Company, in its disability income protection plan, also pursues one employment policy for women and another for men. Disabled male workers receive comprehensive coverage under the plan. Disabled female workers, however, are subject to a gaping, sex-linked, exception. This differential treatment violates the Title VII prohibition on *per se* sex classifications which the Court confirmed in *Phillips*.

Liberty Mutual seeks to avoid the application of *Phillips* to this case by describing the issue as exclusion of pregnancy, not exclusion of *disability* caused by pregnancy. Its argument centers on the *source* of disability—pregnancy, childbirth and related conditions—rather than the fact of disability, which occurs at some, normally brief, time during the course of a pregnancy. Since men never become pregnant, Liberty Mutual claims that its plan does not treat persons of "like qualifications" differently, but rather differentiates between persons of *unlike* qualifications. But the Company plan is not designed to give money to *able* workers with physical conditions, such as a weak heart, sprained ankle, or pregnancy, having no effect on their capacity to do the day's work. Instead, the plan offers income protection to *disabled* workers during the disability period, whatever the source of their disability, on a comprehensive basis. It does not generally categorize by source of disability; a broken leg may be uniquely different from a heart attack, but both disable a worker for some time, and the worker receives income protection for the time he or she is disabled. As the Employee Group Benefit Handbook proudly asserts, "When disability . . . keeps you away from work, your Income Protection plan is designed to continue a portion of your usual earnings." Petitioner's Brief, A2.

Since the focus of the plan is income protection for disability, the focus of the legal issue must be: can disabled women workers be treated differently than disabled men workers? As to the central issue of disability, women employees disabled by pregnancy and disabled men workers unquestionably have "like qualifications," *Phillips, supra,* for the benefits here in controversy. Both groups are unable to work for medically certifiable reasons, both face a loss of income, hospitalization, medical expenses and even the risk of death. Thus, under *Phillips,* Liberty Mutual's exclusion of a sub-class of disabled women workers from its disability income protection plan must be held to violate Section 703(a).

Although the exclusion does not use the term male or female, the categorization "pregnancy-related disabilities" is plainly a sex-based classification under Title VII.[2] Not only does the exclusion affect women and only women. (Indeed, pregnancy-related disabilities are the result of a physical structure and biological potential which, more than any other characteristic, define a person as a member of the female sex.) It also has a devastating impact upon women, and only women, in the labor force, precisely the ill Title VII was designed to remedy. *See Sprogis* v. *United Air Lines, Inc.,* 444 F. 2d 1194, 1198 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971):

> . . . Congress intended to strike at the entire spectrum of disparate treatment affecting men and women resulting from sex stereotypes. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have

[2] *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), does not call for another conclusion. See Section II of this Brief, *infra.*

> plagued women in the past. The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex . . . .

Should this Court disregard the impact of pregnancy classifications on women in the labor force and hold that Section 703(a) allows employers to single out women disabled by pregnancy and related conditions in a disability income protection plan, a major area of Title VII law would be overturned. For if classifications related to pregnancy are not sex-based classifications under Section 703(a), then employers can refuse to hire pregnant women, fire them, force them on long, unpaid leaves of absence, wipe out their accrued seniority benefits, and deny them medical insurance benefits—all based on the theory that pregnancy is unique, is not sex-based, and the employers can therefore treat pregnant women as they like. Most of these issues have already been litigated, with courts generally finding that employer policies relating to pregnant women constitute sex-based classifications in violation of Title VII. *See, e.g., Satty* v. *Nashville Gas Co.,* —— F. 2d ——, 11 FEP Cases 1 (6th Cir. 1975) (loss of job bidding seniority); *Holthaus* v. *Compton & Sons, Inc.,* 514 F. 2d 651 (8th Cir. 1975) (firing); *Communication Workers of America* v. *American Telephone & Telegraph Co.,* 513 F. 2d 1024 (2d Cir. 1975) (*Aiello, supra,* does not require dismissal of complaint alleging Title VII violations as to accrual of seniority and payments under health insurance plans); *Vineyard* v. *Hollister School District,* —— F. Supp. ——, 8 FEP Cases 1009 (N.D. Cal. 1974) (mandatory, unpaid leave; discontinuance of payments for insurance pre-

miums); *Doe* v. *Osteopathic Hospital,* —— F. Supp. ——, 3 FEP Cases 1128 (D. Kan. 1971) (firing of unwed pregnant employee). *Cf. Truitt* v. *Stromberg Carlson Corp.,* Case No. CSF-27162-72 (N.Y. State Division of Human Rights, June 26, 1975) (health insurance plan providing for lower hospital and doctor bill payments violates New York State Human Rights Law).

A decision for Petitioner in this case would cast all these decisions under a dark cloud, and would reverse the strong trend following in the wake of this Court's decision in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974). For although that case construed the due process clause, not Title VII, its practical effect was to bring to a virtual halt employers' efforts to vindicate mandatory unpaid leave policies for pregnant employees. Employers undoubtedly realized that if such a policy could not survive the due process test it was unlikely to survive the more exacting test of Section 703(a) of Title VII.[3]

Liberty Mutual itself provides a typical example of employers' reluctant but evolving adjustment to Title VII authority. It relinquished the policy of firing pregnant women in September, 1970. And perhaps with a view to the exigencies of its current position in this litigation, Liberty Mutual does not now defend, as it did in the courts below, its policy of firing women who were physically unable to return to work within three months of birth or six months of leave time (whichever came first), although no other disabled workers were subject to this drastic policy. *See Wetzel* v. *Liberty Mutual Insurance Co.,* 511 F. 2d 199, 207 (3d Cir. 1975). If Petitioner were to prevail in this case, nothing would prevent it from reverting to old ways, including its former policy of firing pregnant women.[4]

[3] Before *LaFleur* was decided, numerous cases were brought under the equal protection clause challenging mandatory leave policies, especially those of public schools. *See, e.g., Green* v. *Waterford Board of Education,* 473 F. 2d 629 (2d Cir. 1973), and the cases cited therein. These cases were not brought under Title VII because it did not cover school teachers at that time. After *LaFleur,* however, litigation on the issue virtually ceased, even under Title VII. *See Holthaus* v. *Compton & Sons, Inc., supra,* for one of the rare exceptions.

Nor would the potential impact of reversal of the judgment below necessarily be limited to pregnant women workers; it might extend to any employer decision based on the possibility that a woman might become pregnant. Most women workers can become pregnant, and this very fact influences many employer decisions. Woman's expected role as first the bearer and then the rearer of children has been the prime generator of the widespread employer discrimination against women workers that necessitated Title VII's ban on gender discrimination. Employers have refused to train women for management positions on the ground that women might become pregnant, *Hodgson* v. *Security National Bank,* 460 F. 2d 57, 62 (8th Cir. 1972); they have fired women just for getting married, *Sprogis* v. *United Air Lines, Inc., supra;* and they have refused to hire mothers of pre-school age children. *Phillips* v. *Martin Marietta Corp., supra.* Employers without a stimulus to re-examine old notions assume that women want to, or believe that women should, spend full time taking care of their children. Thus employers view these discriminatory policies as fully justified. Such customary employer be-

[4] This is so despite Petitioner's apparent concession now that both policies violate Title VII. *See* Petitioner's Brief, 21 n. 39 (referring to "maternity exclusion in a leave of absence policy" rather than to *firing* the affected employees).

liefs blind them to the reality that a large and ever-increasing percentage of women with children are employed outside the home. In fact, one-third of all mothers with pre-school age children are in the work force;[5] and as is the case with pregnant women, many of them work out of dire economic necessity.[6] The employer view that mothers and expectant mothers are not or should not be attached to the labor market and therefore may be deprived of standard employment benefits offered other workers is not only inaccurate and unfair to women workers; it can also have severe consequences on the economic well-being of women's families. This impact will be most severe on minority families, since a disproportionate number of them are headed by women.[7]

---

[5] In 1974, 32.4% of mothers with children under three years old were in the work force, as were 42.3% of mothers with children aged three to five, and 53.8% of mothers with children aged six to seventeen. United States Dept. of Labor, Bureau of Labor Statistics, Summary—Special Labor Force Report, August, 1974, Marital and Family Characteristics of Workers, March, 1974. *See also* the statistics cited in *Taylor* v. *Louisiana*, 95 S. Ct. 692, 700 n. 17 (1975).

[6] Two-thirds of the 36 million women in the labor force work because of pressing economic need; either they are single, widowed, divorced or separated, or they have husbands earning less than $7,000 per year. United States Dept. of Labor, Women's Bureau, Why Women Work (Rev. ed. 1975). According to the Census Bureau, women appear to constitute the largest identifiable group of poor people in the nation. United States Bureau of the Census, Female Family Heads (Series p-23, Report #50, 1974).

[7] Among white families, 19.7% of all families are headed by a woman; among black families, 33.6% are headed by a woman. United States Comm'n on Civil Rights, Women and Poverty, 52, Table 11 (1974). Among female-headed families with children under 18 years old, 36.9% of the white families were below the low-income level, as were 60% of the black families. *Id.* at 58, Table 19.

The bind in which pregnant working women find themselves was well-described in a recent ACLU report, Hayden, Punishing Pregnancy: Discrimination in Education, Employment and Credit, Women's Rights Project, American Civil Liberties Union (October, 1973) at 43-44:

> First, a woman whose income from employment is vital to her own survival or that of her family is laid off for several months on an involuntary maternity leave. But if she looks for another job, she runs full-tilt into the wall of prejudice which decrees that pregnant women are unemployable. Then, if she turns as a last resort to unemployment benefits (to which she may have been contributing during her years as a wage earner) she is sent away because pregnancy is deemed to render her "unavailable" for employment.

This description assumes that ultimately the woman can return to her job. But employers still fire pregnant women outright. *Holthaus* v. *Compton and Sons, Inc., supra.* And even if a woman is lucky enough to retain her job, she may find that just when her expenses increase, her income decreases. She receives no disability benefits to compensate her for loss of income, and she will probably find that her health insurance covers only a fraction of her medical and hospitalization costs. Finally, she may find that she has no guarantee of returning to her former position but must take a lesser one, often at a sacrifice of all or some of her accumulated seniority.

The result of such deep and pervasive discrimination is to increase the number of women who are only marginally attached to the labor force, for women exposed to treatment which makes clear their low status in the work force some-

times fulfill the employer prophecy: they do lose interest in pursuing advancement in gainful employment because the odds against them seem overwhelming. *See generally* Koontz, Childbirth and Child Rearing Leave: Job-Related Benefits, 17 N.Y.L. Forum 480 (1971); Comment, Love's Labors Lost: New Conceptions of Maternity Leaves, 7 Harv. Civ. Rights—Civ. Lib. L. Rev. 260 (1972). Since a woman's childbearing years are also those in the careers of working people when they most frequently are establishing themselves in the labor market, developing skills, and laying the foundation for advancement, discrimination based on the view that pregnancy and work force membership don't mix can have devastating life-long effects on working women. As the Second Circuit Court of Appeals observed in a case challenging mandatory unpaid leave for pregnant workers:

> One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed.

Green v. *Waterford Board of Education, supra,* 473 F. 2d at 634. A holding that an employer policy singling out pregnant women for harsh treatment does not discriminate on the basis of sex within the meaning of Section 703(a) of Title VII would assure perpetuation of such "old accepted rules and customs."

In sum, the full implications of Petitioner's argument merit this Court's close attention. In essence, a ruling for Petitioner would overturn a body of precedent that, at last, has begun to open to women genuine equality of opportunity in the labor market.

B. *This Court Should Give "Great Deference" to the EEOC Guidelines That the Denial of Disability Benefits to Women Disabled by Pregnancy and Related Conditions Constitutes a Prohibited Sex Classification, as Has Every Court of Appeals to Consider the Issue.*

The EEOC has clearly recognized the potential impact of discriminatory treatment of pregnant women. Its guidelines, adopted after several years' experience administering the Act, take the position that classifications related to pregnancy are sex-based in violation of Section 703(a), and firmly reject Liberty Mutual's theory that since pregnancy is unique, pregnant workers may be treated as harshly as the employer wishes. Instead, the guidelines focus on those aspects of pregnancy that are relevant to employment decisions. Thus, the employer is not permitted to make decisions based solely on the state of pregnancy, but is required to consider how pregnancy affects the woman's ability to work. The healthy pregnant woman who is able to work is treated like all other healthy people and the disabled pregnant woman is treated like all other disabled people for purposes of all employment decisions.

For example, Section 1604.10(a) of the guidelines, 29 C.F.R. §1604.10(a), makes it a *prima facie* violation of Title VII to refuse to hire or to fire pregnant women:

> A written policy or practice which excludes from employment applicants or employees because of pregnancy is in *prima facie* violation of Title VII.

This is based on the relevant fact that pregnant women are able to work through much or most of their pregnancy. *See Cleveland Board of Education* v. *LaFleur, supra.* In this aspect of their pregnancy, they are like other *able*

workers and may not be singled out for a loss of employment opportunities.

Similarly, Section 1604.10(b) of the guidelines, 29 C.F.R. §1604.10(b), requires that *disabilities* caused by pregnancy, childbirth and related conditions be treated like all other disabilities:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

This Court has instructed that the EEOC guidelines are entitled to "great deference." *Albemarle Paper Co.* v. *Moody,* 95 S. Ct. 2362 (1975); *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971); *Phillips* v. *Martin Marietta Corp., supra,* 400 U.S. at 545 (Marshall, J. concurring). Every Court of Appeals to consider the issue presented by the instant case has followed this Court's command and applied the EEOC guidelines to find that employers may not exclude pregnancy-related disabilities from disability income protection plans. *Satty* v. *Nashville Gas Co., supra; Hutchi-*

son v. *Lake Oswego School District,* —— F. 2d ——, Nos. 74-3181, 3182 (9th Cir. July 21, 1975); *Gilbert* v. *General Electric Co.,* —— F. 2d ——, 10 FEP Cases 1201 (4th Cir. 1975); *Holthaus* v. *Compton & Sons, Inc., supra; Communication Workers of America* v. *American Telephone & Telegraph Co., supra; Wetzel* v. *Liberty Mutual Insurance Co., supra.*

Petitioner argues that the EEOC's guidelines concerning pregnancy-related disability discrimination should not be accorded in this case their customary "great deference," first, because they were not issued contemporaneously with passage of the Act, and second, because they are a "dramatic reversal" of the Commission's former position on the subject. The first argument is without merit. The second is untrue.

The EEOC's interpretation of Title VII, whenever officially announced, is a statement of principles which from the outset inhere in the Act itself. The timing of the agency's interpretation is therefore of little relevance in determining the validity of that interpretation. *Bartmess* v. *Drewrys U.S.A., Inc.,* 444 F. 2d 1186 (7th Cir.), *cert. denied,* 404 U.S. 939 (1971).

In areas other than pregnancy-related disabilities, guidelines not issued contemporaneously with the effective date of the Act have been given full recognition by the courts. Indeed, in *Griggs* itself, when this Court first gave "great deference" to the EEOC guidelines, the Court noted that the EEOC has issued two sets of guidelines on testing. *Griggs, supra,* 401 U.S. at 433 n. 9. The first were titled Guidelines on Employment Testing Procedures, issued on August 24, 1966; the second, titled Guidelines on Employee

Selection Procedures and issued on August 1, 1970, 35 Fed. Reg. 12333, constituted in the Court's view an "elaboration" of the prior position. The guideline declaring that different retirement ages for men and women violate Title VII was issued in February of 1968, 33 Fed. Reg. 3344, 29 C.F.R. §1604.31(a) (now codified as 29 C.F.R. §1604.9(f)), and given great deference by the Seventh Circuit in *Bartmess* v. *Drewrys, U.S.A., Inc., supra.* It was subsequently modified on April 4, 1972 (the same day 29 C.F.R. §1604.10 issued) to provide that different retirement benefits based on sex also violated Title VII, 37 Fed. Reg. 6837, 29 C.F.R. §1604.9(f); the Third Circuit accorded this guideline great deference finding it of "no moment" that "the guideline was not promulgated until after this suit was initiated." *Rosen* v. *Public Service Electric & Gas Co.*, 477 F. 2d 90, 94 (3d Cir. 1973).

An even more important guideline, expressing the EEOC's view that state labor laws regulating women's employment (so-called "protective" legislation) conflict with Title VII's policy of nondiscrimination, was issued, "albeit after considerable hesitation," *Rosenfeld* v. *Southern Pacific Co.*, 414 F. 2d 1219, 1226 (9th Cir. 1971), in August of 1969. 34 Fed. Reg. 13367, 29 C.F.R. §1604.1(b) (now modified and codified as 29 C.F.R. §1604.2(b)). That guideline has also been accorded great deference by the courts, *see, e.g., Rosenfeld* v. *Southern Pacific Co., supra,* despite a prior contrary guideline, 30 Fed. Reg. 14927 (1965), and despite the fact that such legislation had been upheld under the fourteenth amendment by this Court. *See e.g., Muller* v. *Oregon,* 208 U.S. 412 (1908). *But see Mengelkoch* v. *Industrial Welfare Commission,* 442 F. 2d 1119 (9th Cir. 1971) (holding that a constitutional equal protection challenge to

such state labor laws presented a substantial question warranting adjudication by a three-judge district court).

Indeed, Congress itself has recognized that the process of interpretation of Title VII is necessarily an evolutionary one. The Report of the Senate Committee on Labor and Public Welfare recommending passage of amendments to strengthen Title VII enforcement summed up this perception as follows:

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization . . . . Experience has shown this view to be false.
>
> Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs . . . . In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful.

S. Rep. No. 92-415, 92d Cong., 1st Sess., 5 (1971). *See also* H.R. Rep. No. 92-238, 92d Cong., 2d Sess., 8 (1971). The Report's observation is particularly relevant to the evolution that occurred concerning employer pregnancy rules, "one of the problems that . . . baffled the Commission most." Testimony of Charles T. Duncan, General Counsel of the EEOC, August, 1965, to October, 1966, Joint Appendix, Vol. III, 561, *Gilbert* v. *General Electric Co., supra.*

This period of evolution was marked by increasing consciousness of the problem of pregnancy-related sex discrimination throughout the federal government. On October 29, 1970, the Citizens' Advisory Commission on the Status of Women adopted a statement of principles substantially the same as the pregnancy guideline finally issued by the EEOC on March 30, 1972. *See* Koontz, Childbirth and Child Rearing Leave: Job-Related Benefits, 17 N.Y.L. Forum 480, 481-482 n. 11 (1971). The Office of Federal Contract Compliance, the agency responsible for enforcement of Executive Order 11246, as amended by Executive Order 11375, early considered maternity issues within the coverage of the Executive Order's prohibition of sex discrimination, *see* 41 C.F.R. §60-20.3(g) (1971), but, like the EEOC, developed and refined its understanding of the phenomenon over time. *See* Proposed Sex Discrimination Guidelines, §60-20.3(h)(2), 38 Fed. Reg. 35336, 35338 (1973), a provision virtually identical to the EEOC's pregnancy guideline.

Thus the EEOC, faced with unusually difficult problems of statutory construction,

> ". . . carefully scrutinized both the employer practices and their crucial impact on women for a substantial period of time and then issued its Guidelines after it had become increasingly apparent that systematic and pervasive discrimination against women was frequently found in employers' denial of employment opportunity and benefits to women on the basis of the childbearing role, performed solely by women." Brief of the United States Equal Employment Opportunity Commission as *amicus curiae* . . . .

Geduldig v. *Aiello, supra,* 417 U.S. at 502 n. 6 (dissenting opinion of Brennan, J.). It is therefore entirely proper that the EEOC withheld a formal interpretation until it had time to consider the issue fully in light of its experience under the Act.

Nor has the EEOC "dramatically reversed" its position on the issue. Throughout its Brief, Petitioner implies that the EEOC's guidelines on pregnancy-related disabilities constituted a reversal of a former set of guidelines.[8] This is simply not true. In fact, the 1972 guidelines were the first regulatory policy ever promulgated by the EEOC concerning pregnancy, and they constituted the culmination of the evolutionary process in the Commission's thinking concerning pregnancy discrimination. Before the guidelines, however, the EEOC had no stated regulatory policy on the issue and thus the guidelines reversed nothing.[9]

[8] *See* Petitioner's Brief at 4, stating that "In 1972, at a time when the Equal Employment Opportunity Commission's . . . *then-applicable guidelines permitted the exclusion of pregnancy-related disabilities from an employee disability program* . . . Wetzel and Ross . . . filed charges with the Commission . . . ." (emphasis added) (In fact, Wetzel and Ross filed charges with the EEOC on May 14, 1971; and they filed their lawsuit on February 28, 1972, more than a month before the EEOC issued 29 C.F.R. §1604.10, 37 Fed. Reg. 6837 (April 4, 1972). *See Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239 (3d Cir.), *cert. denied*, 43 U.S.L.W. 3644 (U.S. June 9, 1975).) Petitioner's Brief at 5, 24, 25, refers to the EEOC's "current" or "present" guidelines. And Petitioner's Brief at 25, note 48, states that, "The will of Congress, as reflected by the 1972 amendments to the Act, was, if expressed at all, to continue the Commission's *then-existing policy of sanctioning a pregnancy exclusion.*" (emphasis added)

[9] The First Annual Report cited in Petitioner's Brief at 13-14 n. 21 is not a legal interpretation of Title VII. The only authoritative interpretations of the Act are guidelines and opinion letters signed by the General Counsel on behalf of the Commission. *See* 29 C.F.R. §§1601.29, 1601.30; *Sprogis* v. *United Air Lines, Inc., supra,* 444 F. 2d at 1200-01; *Local 189, United Papermakers* v.

Although the Commission issued no guidelines on the issue until 1972, EEOC decisions began much earlier to reflect the agency's evolving realization that employer policies relating to pregnancy and childbirth discriminated against women workers. *See, e.g.,* CCH EEOC Decisions (1973) ¶6125 (June 16, 1969) (termination of an employee on the basis of pregnancy violates Title VII); CCH EEOC Decisions (1973) ¶6084 (Dec. 16, 1969) (discharge of pregnant women because of refusal to grant leave of absence for pregnancy violates the Title); CCH EEOC Decisions (1973) ¶6170 (Sept. 17, 1970) (policy of firing pregnant women in the sixth month of pregnancy violates the Title); CCH EEOC Decisions (1973) ¶6184 (Dec. 4, 1970) (termination of unmarried pregnant employees and of married pregnant employees with less than two years service, and denial of reemployment to those women given leave—married pregnant women with more than two years service—where no vacancy exists violates the Title); CCH EEOC Decisions (1973) ¶6221 (March 19, 1971) (denial of disability benefits to female employees disabled by pregnancy violates the Title). Development of the guideline itself took place for over a three year period. *See* Comment, Love's Labors Lost: New Conceptions of Maternity Leaves, 7 Harv. Civ. Rights—Civ. Lib. L. Rev. 260, 269 n. 54 (1972).

Thus, there was no "drastic reversal" of a former authoritative regulation on pregnancy discrimination, but rather a gradual development of understanding of the problem. The EEOC's final resolution of the issue as em-

United States, 416 F. 2d 980, 997 (5th Cir. 1969), ***cert. denied,*** 397 U.S. 919 (1970). Reasonable cause decisions are not entitled to deference by the courts, nor does an EEOC "no reasonable cause" decision bar a Title VII lawsuit. ***McDonnell Douglas Corp.*** v. ***Green,*** 411 U.S. 792 (1973).

bodied in the pregnancy guideline clearly enhances the purposes and policies underlying the legislation and indeed is essential if women are to gain equality in the labor market. The guideline is entitled to great deference.

C. *Giving "Great Deference" to the EEOC Guidelines on Pregnancy-Related Disabilities Is Impelled by Congress' Action on Regulations Virtually Identical to the EEOC Guidelines and by the Legislative History of Title VII.*

There is no explicit legislative history for Title VII on the issue of pregnancy-related disabilities. However, Congress has recently directed attention to that very issue in considering and rejecting amendments to the implementing regulations for Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.* (1974). These regulations, virtually identical to the EEOC position, provide:

> *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefits offered to employees by virtue of employment.

Section 86.57(c), 40 Fed. Reg. 24144 (1975).

The Title IX regulations construe broad statutory language similar in scope to Title VII.[10] They were placed

[10] Title IX provides in pertinent part:
No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or

before Congress for a forty-five day period during which hearings were held and the content of the regulations thoroughly canvassed. The determination to permit the Title IX regulations to become effective without change is a plain indication that Congress intended Title VII to be interpreted in the same way. *See Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 89 (1973), in which this Court stated that Congressional action taken after Title VII was passed indicated Congress' intent in passing Title VII. The issue in *Espinoza* was whether Congress intended the Title VII term "national origin" to include the status of being an alien. The Court concluded that Congress did not so intend, in part because Congress passed laws after Title VII which barred aliens from federal employment; and Congress simply would not have taken two diametrically opposed positions—on the one hand prohibiting discrimination against aliens and on the other hand requiring such discrimination. As the Court wrote, had it ignored the second set of laws it would have been required:

> . . . to conclude that Congress itself has repeatedly flouted its own declaration of policy. This Court cannot lightly find such a breach of faith.

Espinoza, supra, 414 U.S. at 90-91. It is similarly untenable to urge that Congress intended, by its silence as to pregnancy in passing Title VII, to allow employers to deny women workers disabled by pregnancy and related conditions the fringe benefits given other disabled workers. A Congress so minded could not sanction a Title IX regula-

be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. §1681(a).

tion requiring employers to give these same women workers the same fringe benefits. Congress would not so "flout its own declaration of policy." Rather, the Title IX regulations reinforce the conclusion that the EEOC guidelines correctly interpret Congressional intent in passing Title VII.[11]

This recent indication of Congressional intent as to pregnancy-related disabilities is strengthened by specific Title VII legislative history indicating determined Congressional support for ending all forms of sex discrimination. Although the idea that sex discrimination was added to Title VII coverage only as a cynical measure by racist congressmen who wished to defeat the entire bill has been widely publicized, the legislative history of the Act clearly indicates that this was not the case. Many members of Congress were acutely aware of the severe discrimination to which women had always been subjected in the labor force and understood the implications of such discrimination for our national commerce. In particular, several Congresswomen spoke strongly and movingly on behalf of including sex discrimination in the Title, and the vote to

[11] In reasoning from the silence of Congress, and ignoring the most recent, directly relevant, Congressional action, Liberty Mutual also misconceives the test for determining when EEOC guidelines should be upheld. It suggests that *Aiello,* rather than the EEOC guidelines, should govern this case because ". . . the Act's legislative history does not disclose a congressional intent to prohibit a pregnancy exclusion." Petitioner's Brief at 11. But this Court has disregarded the EEOC guidelines only where ". . . application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question." *Espinoza, supra,* 414 U.S. at 95. There is no such intent here; rather, as discussed above, the only indication is that Congress intended to prohibit the exclusion of pregnancy-related disabilities from income protection plans.

do so was taken shortly thereafter.[12] *See* 110 Cong. Rec. 2577-84 (1964), especially the remarks of Representatives Griffiths, *id.* at 2578-80, St. George, *id.* at 2580-81, May, *id.* at 2582, and Kelly, *id.* at 2582-83. Moreover, one of the nation's oldest feminist groups had actively lobbied for inclusion of sex discrimination,[13] and Congresswoman Kelly announced she supported inclusion on behalf of several national organizations which had consistently sought addition of sex to the enumerated categories in all laws forbidding discrimination. *Id.* at 2582. Finally, the Equal Pay Act of 1963 was the result of a long and thorough study of the problem of sex discrimination in wages and that legislative history forms a backdrop to the passage of Title VII.[14] In the course of the Equal Pay Act debates, Secretary of Labor Wirtz and many Senators and Representatives repeatedly stressed the second class status women occupied in the work force.[15] On signing the Act in 1963, President Kennedy explained why it was necessary:

---

[12] It is also true that some men favoring the amendment opposed passage of Title VII and were not genuine supporters of women's rights, as evidenced by their jocular approach to the amendment. *See* the remarks of Representative Smith, 110 Cong. Rec. 2577 (1964). Other men, however, appeared committed to the inclusion of a prohibition against sex discrimination. *See* the exchange between Representatives Green and Huddleston, 110 Cong. Rec. 2584 (1964). Given the genuine support of many representatives, the majority vote to include sex discrimination cannot be denigrated as a "tongue-in-cheek" measure.

[13] National Woman's Party, Bulletin of Feb. 10, 1964, quoted in Berger, Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women, 5 Valparaiso U.L. Rev. 326, 332-333 (1971).

[14] Margolin, Equal Pay and Equal Employment Opportunities for Women, 19 N.Y.U. Conf. on Lab. 297 (1966).

[15] 109 Cong. Rec. 2888-89 (1963); *id.* at 8916 (Senator Hart); *id.* at 9199 (Representative Green); *id.* at 9201-02 (Representative Kelly); *id.* at 9211-12 (Representative Ryan); *id.* at 9199-200 (Representative Dwyer). *See also id.* at 8914 (Senator McNamara).

> [T]he average woman worker earns only 60 percent of the average wage for men .... Our economy today depends upon women in the labor force. One out of three workers is a woman. Today, there are almost 25 million women employed, and their number is rising faster than the number of men in the labor force. *It is extremely important that adequate provision be made for reasonable levels of income to them, for the care of the children ... and for the protection of the family unit* .... Today one out of five of these working mothers has children under three. Two out of five have children of school age. Among the remainder, about 50 percent have husbands who earn less than $5,000 a year—many of them much less. *I believe they bear the heaviest burden of any group in our nation* .... (emphasis added)

XXI Cong. Q. No. 24, p. 978 (June 14, 1963), as quoted in *Phillips* v. *Martin Marietta Corp.*, 416 F. 2d 1257, 1261 n. 15 (5th Cir. 1969) (dissenting opinion of Brown, C.J.).

Whatever ambiguity might be thought to exist with regard to the passage of Title VII in 1964, there can be no doubt about the intent of Congress in 1972, when it passed an amendment to Title VII, the Equal Employment Opportunity Act. In explaining why the amendment was needed, the House Committee on Education and Labor wrote:

> The situation of the working women is no less serious [than that of minorities]. Women currently comprise approximately 38% of the total work force of the Nation. There are approximately 30 million employed women.
>
> Recent statistics released from the U.S. Department of Labor indicate that there exists a profound eco-

nomic discrimination against women workers. Ten years ago, women made 60.8% of the average salaries made by men in the same year; in 1968, women's earnings still only represented 58.2% of the salaries made by men in that year. Similarly, in that same year, 60% of women, but only 20% of men earned less than $5,000. At the other end of the scale, only 3% of women, but 28% of men had earnings of $10,000 or more.

Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.

Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964. The Equal Employment Opportunity Commission has progressively involved itself in the problems posed by sex discrimination, but its efforts here, as in the area of racial discrimination, have been ineffective due directly to its inability to enforce its findings.

In recent years, the courts have done much to create a body of law clearly disapproving of sex discrimination in employment. Despite the efforts of the courts and the Commission, discrimination against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable.

This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of pro-

> hibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.

H.R. Rep. No. 92-238, 92d Cong., 1st Sess., 4-5 (1971). *See also* S. Rep. No. 92-415, 92d Cong., 1st Sess., 7-8 (1971).

There can be no doubt that Congress viewed all forms of employment discrimination against women with the utmost seriousness. Congress did, of course, leave it to the EEOC to articulate with more specificity which practices were illegal, and this is what the Commission has done—especially as to pregnancy-related discrimination, one of the areas in which the Commission "progressively involved itself." The legislative history thus fully supports the position that the EEOC guidelines on pregnancy-related disabilities are entitled to "great deference." [16]

D. *Petitioner's Exclusion of Pregnancy-Related Disabilities From Its Disability Income Protection Plan, Even If Not Assessed as a* Per Se *Sex Classification, Would Be Prohibited Under Section 703(a) as a Neutral Policy With a Disparate Impact on Women Workers.*

In *Griggs* v. *Duke Power Co., supra,* this Court held that an employer policy, neutral on its face, which has a disparate impact on a protected class violates Title VII unless justified by business necessity.[17] The testing and

---

[16] The legislative history of the Equal Rights Amendment is in accord, despite Petitioner's assertion to the contrary in its Brief at 11-12. *See* Brown, Emerson, Falk & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L. J. 871, 929-932 (1971); this article was the "primary legislative history" of the amendment. 118 Cong. Rec. S9097 (1972).

[17] For applications of the doctrine to women workers, *see Rose* v. *Bridgeport Brass Co.*, 487 F. 2d 804 (7th Cir. 1973) (disparate impact of job reclassification system); *Meadows* v. *Ford Motor*

diploma requirements at issue in *Griggs,* although they affected some whites, were illegal because they fell most heavily on blacks. While Petitioner's exclusion of pregnancy-related disabilities from its disability plan is not a classic example of such a neutral policy, in that it can apply only to women workers and affects no men workers, it is a neutrally-worded policy containing no explicit reference to women or men. Thus, if this Court holds that the exclusion is not an explicit *per se* sex classification, it must conclude that the exclusion is a neutral policy having a disparate impact on women workers. No statistics need be cited to prove its disparate impact, since only women are affected by the policy.

Petitioner attempts to conceal this impact by contending that "Female Liberty employees do not receive less benefits or aggregate risk coverage under the income protection plan than do their male counterparts. In fact, under plans such as Liberty's, females receive a disproportionately high percentage of benefits. . . ." Petitioner's Brief at 6. Liberty Mutual presented no evidence below for this proposition. More important, Respondents Wetzel and Ross have not challenged the effect of the overall benefit plan, but only that of the exclusion. Analysis of discriminatory impact must therefore focus on the effect of the exclusion, not the effect of the whole plan. In a similar

Co., 62 F.R.D. 98, 101 (W.D. Ky. 1973) (disparate impact of minimum weight requirement), ***modified and aff'd on other grounds,*** 510 F. 2d 939 (6th Cir. 1975); *Danner* v. *Phillips Petroleum Co.*, 447 F. 2d 159 (5th Cir. 1971) (disparate impact of granting seniority and bumping rights only to holders of unionized jobs); *cf. Andrews* v. *Drew Municipal Separate School Dist.*, 371 F. Supp. 27 (N.D. Miss. 1973) (disparate impact of refusal to employ parents of illegitimate children), ***aff'd on other grounds,*** 507 F. 2d 611 (5th Cir. 1975).

situation, for example, this Court would not uphold the exclusion of disabilities caused by sickle-cell anemia because blacks receive "a disproportionately high percentage of benefits;" the only question would be whether the exclusion itself was discriminatory. *See Griggs, supra,* 401 U.S. at 430 n. 6, where this Court examined statistics showing the impact on blacks of the testing and diploma requirements, and did not even consider statistics showing the company's overall employment of blacks.[18]

E. *Liberty Mutual Has Not Asserted or Proved a Defense to Its Violation of Section 703(a).*

Both the District Court and the Court of Appeals found that Liberty Mutual failed to assert at trial or on its motion for reconsideration any affirmative defense or even to allege evidentiary facts in support of a defense. 511 F. 2d at 208; 372 F. Supp. at 1164. Indeed, on its motion for reconsideration Liberty Mutual argued that it was impossible to present any statistical evidence on the cost of extending disability benefits to women disabled by pregnancy and related conditions because no statistics were available.

Nevertheless, in its brief before this Court, Liberty Mutual has argued, albeit to show that the exclusion was not "invidious," that it excluded pregnancy-related disabilities "because such coverage is 'extraordinarily expensive.' . . ." Petitioner's Brief, 16. A cost argument is

[18] *And cf. Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971). The Court there dealt with an explicit sex classification, not a neutral policy disparately affecting women, but it is significant that the Court, as in *Griggs,* examined only the exclusion, not the employer's overall employment of women, which was excellent (*see Phillips* v. *Martin Marietta Corp.*, 411 F. 2d 1, 2 (5th Cir. 1969), *rev'd Phillips, supra,* pointing out that 75 to 80 percent of the persons holding the position at issue were women).

irrelevant to the finding whether discrimination prohibited by Section 703(a) of Title VII has occurred (as opposed to whether a defense to such discrimination exists). The only intelligible possibility is that Liberty Mutual is attempting now to assert either a Section 703(e) ("BFOQ") or a business necessity defense. If that is the purpose of Petitioner's cost discussion, the attempt must fail. A defense interposed at this stage of the litigation surely comes too late, especially when it is unsupported by any record evidence about the operation of Liberty Mutual's plan. Moreover, neither Section 703(e) nor the business necessity standard allows the cost argument introduced by Petitioner.

Under Title VII, the only statutory defense to an explicit sex classification prohibited by Section 703(a) is that provided by Section 703(e), 42 U.S.C. §2000e-2(e) (1974):

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

However, this Section cannot provide a cost defense in a case challenging discrimination in the provision of fringe benefits, for the "BFOQ" defense allows discrimination only in "hiring and employing."[19] Since Liberty Mutual

[19] Section 703(e) is considerably narrower in coverage than is Section 703(a), which prohibits discrimination in refusals to hire, discharge, compensation, terms, conditions or privileges of employment, as well as any limitation, segregation, or classification which deprives any person of employment opportunities or adversely affects his or her status.

In contrast, Section 703(e) relates exclusively to "hiring and employing." Title VII cases construing the "BFOQ" provision have generally dealt with employer policies excluding persons of one sex from a job opportunity, and not with discrimination in the "compensation, terms, conditions, or privileges of employment." *See, e.g., Sprogis* v. *United Air Lines, Inc., supra; Rosenfeld* v. *Southern Pacific Co., supra; Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228 (5th Cir. 1969) (all dealing with job opportunities and construing the "BFOQ"). *Compare, e.g., Hutchison* v. *Lake Oswego School Dist., supra; Communication Workers of America* v. *American Tel & Tel. Co., supra; Manhart* v. *City of Los Angeles*, —— F. Supp. ——, 10 FEP Cases 101 (C.D. Cal. 1975) (all dealing with discrimination in fringe benefit plans, that is, "compensation, terms, conditions, or privileges of employment," without discussing the "BFOQ").

is not discriminating in "hiring and employing" (the Section 703(e) standard) by excluding pregnancy-related disabilities from its disability plan, but rather is discriminating as to "compensation, terms, conditions, or privileges of employment" (part of the Section 703(a) standard), Section 703(e) simply does not apply. Consequently, Petitioner's cost argument cannot be pegged to the sole statutory defense to proscribed discrimination.[20]

[20] The EEOC guidelines explicitly recognize this by totally prohibiting all differential treatment of pregnancy-related disabilities in various fringe benefit plans, 29 C.F.R. §1604.10(b), and providing further that: "It shall not be a defense under Title VII to a charge of sex discrimination in *benefits* that the cost of such benefits is greater with respect to one sex than the other. (emphasis added) 29 C.F.R. §1604.9(e). The guidelines dealing with *hiring and employing* pregnant women, on the other hand, make the exclusion of such women from employment only a *prima facie* violation of Title VII. 29 C.F.R. §1604.10(a). A "BFOQ" defense may be asserted as to these practices, although "BFOQ" has been so narrowly defined by the courts that the defense is almost never successful. *See, e.g., Rosenfeld* v. *Southern Pacific Co., supra,* 444 F. 2d at 1225 (". . . sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ exception . . . . Equality of footing is established only if employees

The only remaining defense to a violation of Section 703(a) is the judicially created business necessity defense —a defense which is asserted against a neutral rule with a discriminatory impact on a protected class. But cost alone has never been found to meet the strict standards of business necessity. *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971), is illustrative. In that case, the court reviewed the accumulated authority on the business necessity standard and concluded:

> Collectively these cases conclusively establish that the applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. *Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with lesser differential racial impact.* (emphasis added)

444 F. 2d at 798. The court then applied this test to the Lorillard Corporation's business necessity arguments in favor of retaining a discriminatory departmental seniority

---

otherwise entitled to the position, whether male or female, are excluded only upon a showing of individual incapacity."); *see also Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969); *Weeks* v. *Southern Bell Tel. & Tel. Co., supra.*

system. Lorillard first asserted that its system was inherited from a prior plant and was like those used by other companies. This justification, the court declared, was not sufficiently compelling, given the system's discriminatory impact: "[N]either maintenance of the status quo nor conformance to precedent is a legitimate business purpose that will vindicate an otherwise unlawful practice." 444 F. 2d at 799. Liberty Mutual's similar argument that "pregnancy has been historically differentiated in disability income plans," Petitioner's Brief at 18, should fare no better. Title VII was passed precisely because many discriminatory practices were embedded in employment practices nationwide, and Congress intended that this should cease.[21]

Lorillard next argued that it used the discriminatory system at issue to avoid union pressure and the economic costs a strike might impose. Again the court rejected this purpose as not sufficiently compelling to override the discrimination. It noted:

> While considerations of economy and efficiency will often be relevant to determining the existence of business necessity, dollar cost alone is not determinative. For example, although there undoubtedly are significant costs involved in validating tests, *Griggs* requires that employment tests be abandoned if not specifically validated as job-rated. Analogous is Diaz v. Pan American World Airways, 442 F. 2d 385 (5th Cir. 1971), where the court explicitly held that mere customer preference would not justify continuation of a discriminatory hiring policy, even in the context of a

---

[21] *Smith* v. *Troyan*, —— F. 2d ——, 10 FEP Cases 1380 (6th Cir. 1975), cited in Petitioner's Brief at 18 n. 29, is not *contra* because, among other reasons, it arose under the fourteenth amendment, not Title VII.

> sex discrimination case which, unlike race cases, is subject to a "bona fide occupational qualification" exception.

444 F. 2d at 799, n. 8. As to the increased administrative costs Lorillard would encounter, the court commented:

> [W]e have already noted that avoidance of the expense of changing employment practices is not a business purpose that will validate the racially differential effects of an otherwise unlawful employment practice.

444 F. 2d at 800. *See also United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 662 (2d Cir. 1971); *Johnson* v. *Pike Corp. of America*, 332 F. Supp. 490, 495 (C.D. Cal. 1971).

Thus, Liberty Mutual's alleged cost-saving purpose is not sufficiently compelling to override the plan's discriminatory impact. Nor has Liberty Mutual made any showing[22] that there are no alternative policies which would save costs with a lesser differential impact on women. As the *Robinson* court remarked:

> It should go without saying that a practice is hardly "necessary" if an alternative practice better effectuates the intended purpose or is equally effective but less discriminatory.

444 F. 2d at 798, n. 7. *Accord, United States* v. *Bethlehem Steel Corp., supra,* 446 F. 2d at 662. Obvious alternatives are available to Liberty Mutual if cost saving with less discrimination is its objective.[23] They include establishing a longer period prior to commencement of coverage for all workers and limiting coverage to a shorter number of weeks.

[22] Liberty Mutual has the burden of proof on the issue of business necessity. *Griggs, supra,* 401 U.S. at 432.

Finally, Liberty Mutual's cost and statistical presentation is notably deficient in a variety of respects. Liberty Mutual now cites statistics on cost from other companies' experience. As in the proceedings below, it remains silent on its own situation. Perhaps this is because it has no reliable statistics on the length of time of the actual disability caused by childbirth and pregnancy complications, having until so recently fired women who become pregnant. The statistics it does tender are speculative and are entitled to no weight in determining the legality of Liberty Mutual's plan. They were not subjected to adversarial scrutiny in this case and are not based on the period of time women are physically disabled from working, the only time during which benefits are payable under the EEOC guidelines. *See,* for example, Petitioner's Brief at 17-18, citing cost estimates by American Telephone and Telegraph Company based on an assumed maternity leave (rather than a period of pregnancy-related disability) of five and one-half months, when the average period of *disability* is only six to eight weeks. *See* Policy Statement on Pregnancy-Related Disabilities, American College of Obstetricians and Gynecologists, quoted in *Aiello, supra,* 417 U.S. at 501 n. 4 (dissenting opinion of Brennan, J.). Similarly, the cost experience of New Jersey and Rhode Island, Petitioner's Brief at 17, is not relevant. In Rhode Island no proof of actual disability was required for a woman to collect benefits. Rather,

[23] The only evidence in the record as to Liberty Mutual's purpose in excluding pregnancy-related disabilities is that it did so "on advice of counsel." *See supra* at 8.

women were permitted to take the maximum allowable time off from their jobs whether or not they were in fact capable of working. Koontz, Childbirth and Child Rearing Leave: Job-Related Benefits, 17 N.Y. L. Forum 480, 484-485 (1971). The cited New Jersey experience misleadingly refers to only one of three separate New Jersey funds, the "disability during unemployment" fund, which accounts for only 10% of total New Jersey benefits but 74% of the disabilities due to childbirth. Supplemental Brief of Appellees, 3-5, *Aiello, supra. See also* Koontz, *supra,* at 486.

Another defect in the cited statistics is that they are apparently based on the percentage increase in the cost of the benefit program. So stated, these figures sound ominously large; but stated in terms of the percentage increase in *employee* costs, they may be insignificant. A report on discrimination related to pregnancy found, for example:

> In Wisconsin, where in 1971, 46.46% of 45,000 employees of the state government were women, it was calculated that out of each $100 that the state incurred in employee costs, 7¢ would be for temporary disability premiums attributable to pregnancy. True, this 7¢ represented a 30% increase over income continuation premiums excluding pregnancy (22¢), but only .07% of each $100 in employee costs. Thus, when private employers cried that to follow suit would raise their costs by 30%, what they actually meant is that their premiums would rise by 30%, still a negligible fraction of their real employee costs . . . .
>
> The Citizen's Advisory Council on the Status of Women, a body of private citizens whose members are appointed by the President, estimates that the cost to employers of including claims arising from pregnancy under existing temporary disability insurance would be a 10% increase in premiums for a six-week benefit. Consider this figure against the fact that the total cost of *all* health, disability, life and accident insurance premiums is 5.5% of the total wage and salary cost in private industry. The Council stresses that the cost of covering pregnancy-related disability can be held down only if there are no artificial pressures or requirements forcing women to stay off the job longer than necessary. (citations omitted)

Hayden, Punishing Pregnancy: Discrimination in Education, Employment, and Credit, Women's Rights Project, American Civil Liberties Union (October, 1973) at 49-50.

Liberty Mutual also assumes that costs will be enormous because pregnant women will absent themselves from work for a time period "which is substantially longer than any actual inability to work, and is significantly influenced by concern for the welfare of the child in addition to that of the mother." Petitioner's Brief at 19. As the District Court pointed out, however, Liberty Mutual can medically ascertain the actual period of disability, as is done in this country and abroad "in hundreds, if not thousands, of cases daily." 372 F. Supp. at 1164. Moreover, it can certainly require that doctors certify that *any* person receiving disability payments was actually disabled for the entire time of the payment. But it cannot assume that pregnant women (and their doctors) will be especially prone to lie about the period of disability.[24] Nor can it be assumed that a woman

---

[24] The District Court commented on this point:

> . . . as a trial judge who has seen hundreds of cases of soft tissue damage arising from the so-called "whip-lash" type of injuries which produce few observable objective symptoms the court sees no basis for assigning the tendency to malinger as a sex-related characteristic.

372 F. Supp. at 1164.

who has given birth will choose to stay home out of concern for her child's welfare; many women will find their salaries are necessary in order adequately to feed, clothe and house their children,[25] especially when family expenses increase due to the birth of another child. As for the concern that pregnant women will leave the work force, Petitioner's Brief at 18-19, Liberty Mutual can require that any person receiving disability benefits return to work after the period of disability or forfeit the payments. The guidelines demand only that such a requirement be applied equally to all workers.

In conclusion, the factors cited by Liberty Mutual as driving up the costs of a disability plan which covers pregnancy-related disabilities[26] are unsupported by any

[25] Two-thirds of the thirty-six million women in the labor force work because of pressing economic need; either they are unmarried or have husbands who earn less than $7,000 per year. United States Dept. of Labor, Women's Bureau, Why Women Work (Rev. ed. 1975).

[26] It also asserts that pregnancy is voluntary, but this has no necessary effect on cost, and in any event the plan does not exclude other disabilities caused by voluntary activity, such as cancer and other ailments due to smoking. Nor did Liberty Mutual offer any proof that pregnancy has a frequency rate "which dwarfs covered conditions." Petitioner's Brief at 19. In contrast to Petitioner's speculation, national statistics indicate that men and women lose approximately the same average number of disability days of work per year, even including days lost due to pregnancy-related disabilities. *See* United States Dept. of Health, Education and Welfare, Public Health Service, Current Estimates From The Health Interview Survey, United States—1968 (Vital and Health Stats. Series 10, No. 60), Table 8 at 12, Table 16 at 20 (on a per person, per year basis, men lost 3.5 work days and women 4.4 days for disabilities caused by acute conditions, Table 8; total work-loss days were 5.2 per man and 5.9 per woman, Table 16). Moreover, Petitioner's expressed concern about the frequency of birth appears less relevant to women in the labor market than to those who remain outside it. *See* Reports of the Advisory Council on Social

evidence in this case, and are based on inflated statistics and an apparent failure to comprehend that the EEOC guidelines allow the imposition of safeguards against abuse of the program, so long as they apply equally to all workers. The company's belated assertion of a "cost defense" thus has no merit.

II.

The rigorous standard of Title VII, not the traditional constitutional standard applied in *Geduldig* v. *Aiello*, is controlling in this case.

A. *Six United States Courts of Appeals and an Array of State Authorities, Distinguishing Legislative Anti-Discrimination Requirements From Fourteenth Amendment Limitations, Have Declared* Aiello *Inapposite to the Issue Here in Controversy.*

In *Geduldig* v. *Aiello, supra,* this Court held that the equal protection clause does not require inclusion of pregnancy-related disabilities in a state-run social welfare program. Petitioner argues that *Aiello, sub silentio,* foreclosed the Title VII issue presented here and discarded, without even mentioning it, the EEOC guideline directly in point. This bold position stands in glaring contrast to the well-reasoned opinions of six United States Courts of Appeals, including the Second, Third, Fourth, Sixth, Eighth and Ninth. *Satty* v. *Nashville Gas Co., supra; Hutchison* v. *Lake Oswego School District, supra; Gilbert* v. *General Electric Co., supra; Holthaus* v. *Compton & Sons, Inc., supra* (decided after *Aiello* but not explicitly discussing *Aiello*);

Security at 177 (1975) (in the United States as in all industrial societies the greater the percentage of women working the lower the birth rate).

Communication Workers of America v. *American Telephone & Telegraph Co., supra; Wetzel* v. *Liberty Mutual Insurance Co., supra.* These courts have distinguished the *Aiello* fourteenth amendment analysis from the more rigorous, effect-oriented analysis required under Title VII. In *Aiello,* this Court held that the legislative action before it was rational and therefore did not invidiously discriminate when measured by the traditional constitutional standard. The Court plainly did not rule, as Petitioner argues, Petitioner's Brief at 9, that pregnancy classifications are never sex-based. Rather, it indicated that legislative action concerning pregnancy would be vulnerable to challenge under the equal protection clause as impermissible sex classification, if accompanied by an intent to discriminate. 417 U.S. at 496 n. 20. Since Title VII never requires a showing of intent to discriminate, *Griggs, supra,* the identification in *Aiello* of intent as a factor critical under constitutional analysis is simply inapposite to this case. Further, while *Aiello* concerned classifications a legislature might draw, the case at bar concerns a sweeping legislative proscription restricting classifications employers may draw. Moreover, the Court's very silence as to the EEOC guidelines, of which it was well aware, *see Cleveland Board of Education* v. *LaFleur, supra,* 414 U.S. at 638 n. 8, is persuasive that the constitutional adjudication in *Aiello* did not foreclose the issue of what Congress intended to accomplish through Title VII. *See Tyler* v. *Vickery,* 517 F. 2d 1089, 1097-99 (5th Cir. 1975).

Several states have also concluded that *Aiello* is irrelevant in determining whether pregnancy classifications are sex-based for purposes of state fair employment practice laws. Thus, in *Union Free School District No. 6* v. *New*

York State Human Rights Appeal Board, 35 N.Y. 2d 371, 320 N.E. 2d 859, 362 N.Y.S. 2d 139 (1974), New York's highest court held invalid under the state's analogue to Title VII an employer's discriminatory leave policy and denial of fringe benefits for pregnancy-related disabilities.[27] The court reasoned:

> The legal issue in *Aiello,* however, was quite different from that which we confronted [in previous cases]. In *Aiello* the court concluded that the Equal Protection Clause of the Federal Constitution did not preclude a State Legislature from adopting the pregnancy-childbirth classification which was "rationally supportable" in a social welfare program. Thus, a sex-based classification was held to be constitutionally permissible in the context of the California insurance program.
>
> A quite different question was put to us. New York had adopted a statute expressly forbidding discrimination based on sex, a classification which while not foreclosed by constitutional prohibition could be proscribed by legislative enactment. The question we faced then was whether the personnel policies and practices in the cases before us transgressed our statutory proscription. That they might not be constitutionally forbidden was irrelevant.

---

[27] *See also Board of Education, East Williston* v. *Division of Human Rights,* 35 N.Y. 2d 673, 319 N.E. 2d 202, 345 N.Y.S. 2d 93 (1974) (singling out pregnancy for special disadvantageous leave treatment is illegal) and *Board of Education, City of New York* v. *Division of Human Rights,* 35 N.Y. 2d 675, 319 N.E. 2d 203, 360 N.Y.S. 2d 887 (1974) (teacher on a pregnancy-related leave may use sick and sabbatical leave entitlements to same extent as she would be permitted to use them for other temporary disabilities), described and cited with approval in *Union Free School Dist. No. 6, supra.* 35 N.Y. 2d at 376, 320 N.E. 2d at 861, 362 N.Y.S. 2d at 141.

35 N.Y. 2d at 376, 320 N.E. 2d at 860, 362 N.Y.S. 2d at 141-2.

On the same basis, the New York State Human Rights Appeal Board, in *Armbruster* v. *Crouse-Irving Memorial Hospital,* Case No. CS-28495-72, App. No. 2104 (1975) (unpublished), *appeal pending,* N.Y. App. Div., declared illegal under state law the exclusion of pregnancy-related disabilities from a private employer's disability income protection plan. Similar decisions applying state laws comparable to Title VII have been reached in Illinois, Wisconsin, and Maryland. *In re Josephine Frigale,* 2 CCH E.P.G. ¶5212 (Ill. Fair Employment Practices Comm'n, Jan. 16, 1973); *Reidel* v. *Wisconsin Dept. of Employe* [*sic*] *Trust Funds,* 2 CCH E.P.G. ¶5211 (Wisc. Dept. Hum. Rel., Jan. 2, 1974); Section 8(b), Maryland Sex Discrimination Guidelines, 3 CCH E.P.G. ¶23,820.08 (1972).

Title VII and state fair employment laws share a common purpose: to root out policies and practices that artificially hinder the fair integration into the work force of women and other protected groups. Just as state courts have looked to federal Title VII precedent in defining the range of statutory anti-discrimination commands, so this Court has found state interpretations of fair employment practice laws helpful in construing Title VII. *See Espinoza* v. *Farah Manufacturing Co., supra,* 414 U.S. at 88 n. 2.

In sum, *Aiello* called for this Court's judgment as to constitutional limitations on legislative classification. The instant case, by contrast, requires construction of a legislative measure broadly designed to eradicate from the nation's commerce the strains of discrimination that have blighted our history.

B. *The Constitutional Equal Protection Standard Applied to Social Welfare Programs Has No Bearing on Title VII Analysis.*

The holding in *Aiello* is entirely consistent with this Court's well-established precedent regarding the wide leeway available to the legislature in designing welfare programs to deal with myriad social programs. Classifications in social welfare measures, if rationally supportable, have generally withstood challenge under the equal protection clause. *Weinberger* v. *Salfi,* 95 S. Ct. 2457 (1975); *Kahn* v. *Shevin,* 416 U.S. 351, 355-56 (1974); *Jefferson* v. *Hackney,* 406 U.S. 535 (1972); *Dandridge* v. *Williams,* 397 U.S. 471, 486-87 (1970). In contrast to equal protection analysis, the "rationally supportable" criterion has no place in Title VII analysis of an employer's business practice shown to be discriminatory on its face or to impact adversely on a protected class. Rather, as discussed *supra* at 38-43, a heavy burden is placed on the employer to prove that the practice is justified, either as a "BFOQ" in the case of *per se* "hiring and employing" discrimination, *Rosenfeld* v. *Southern Pacific Co., supra; Bowe* v. *Colgate Palmolive Co., supra; Diaz* v. *Pan American World Airways, Inc., supra,* or by a compelling business necessity in the case of a neutral policy having a discriminatory impact. *See Griggs* v. *Duke Power Co., supra; Robinson* v. *Lorillard Corp., supra; United States* v. *Bethlehem Steel Corp., supra; Danner* v. *Phillips Petroleum Co., supra.* Petitioner has not attempted to raise the "BFOQ" as a defense. Nor has it shown any business necessity, compelling or otherwise, for the exclusion. See *supra* at 37-47. In this context, it is meaningless for Liberty Mutual to attempt to show that the exclusion meets the "rationally supportable" standard of review for social welfare programs. That is simply no defense to a Title VII lawsuit.

C. *The Standard of Review in Equal Protection Sex Discrimination Cases Is Less Stringent Than the Standard Applicable Under Title VII to Both Race and Sex Discrimination.*

Petitioner argues that *Aiello* should control this case because the standards of discrimination under the fourteenth amendment and Title VII are equally strong and it would be anomalous to have it otherwise. Petitioner's Brief at 9-11. Even as to race discrimination the statutory command has been distinguished from the constitutional limitation. *See Tyler* v. *Vickery, supra.* For sex discrimination the constitutional and statutory standards are markedly different in a number of respects. For example, under the fourteenth amendment, *per se* sex classifications are permissible in certain circumstances. *Kahn* v. *Shevin, supra; Schlesinger* v. *Ballard,* 95 S. Ct. 572 (1975). Under Section 703(a) of Title VII, however, *per se* classifications are flatly prohibited.

A further, conspicuous, illustration is the different treatment state laws regulating women's employment, so-called "protective" labor laws, have received under the fourteenth amendment and Title VII. Under the fourteenth amendment, these laws have been upheld routinely: *Goesaert* v. *Cleary,* 335 U.S. 464 (1948); *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379 (1937); *Radice* v. *New York,* 264 U.S. 292 (1924); *Muller* v. *Oregon, supra. But cf. Mengelkoch* v. *Industrial Welfare Commission, supra; McCrimmon* v. *Daley,* 418 F. 2d 366 (7th Cir. 1969); *Sail'er Inn, Inc.* v. *Kirby,* 5 Cal. 3d 1, 485 P. 2d 529, 95 Cal. Rptr. 329 (1971). Under Title VII, however, they have been struck down in countless lawsuits brought by women workers barred from employment opportunities by these "protections." *See, e.g., Rosenfeld* v. *Southern Pacific Co., supra; Garneau* v. *Raytheon Co.,* 323 F. Supp. 391 (D. Mass. 1971); *Richards* v. *Griffith Rubber Mills,* 300 F. Supp. 338 (D. Ore. 1969).[28]

In sum, despite significant development of the equal protection principle to prohibit certain gender-based inequalities in law, it is clear that sex discrimination is not yet subject to the same constitutional strictures as is race discrimination. In *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), only four members of the Court endorsed an equal protection/strict scrutiny test for sex discrimination cases. But Title VII, unlike the fourteenth amendment, does not carry a less stringent test for sex discrimination than for race discrimination. Rather, it makes race and sex discrimination in employment equally unlawful; thus, Section 703(a)-(d) provides only one definition of unlawful employment practices.[29] Courts have explicitly recognized that eradication of both forms of discrimination was the legislative objective. *See, e.g., United States* v. *Georgia Power Co.,* 474 F. 2d 906, 921 (5th Cir. 1973) ("Title VII was enacted with the legislative objective of disestablishing the racial and sexual caste systems which had remained ingrained in the American economy since slavery and coverture."); *Rosen* v. *Public Service Electric & Gas Co.,* 409 F. 2d 775, 781 (3d Cir. 1969) ("We do not make the

---

[28] For a comprehensive list of such decisions and an account of the virtual disappearance of such laws, *see* Note: Impact of Rosenfeld and of the EEOC Regulations, in Babcock, Freedman, Norton & Ross, Sex Discrimination and the Law: Causes and Remedies, 269-72 (1975).

[29] Section 703(e) does provide a "BFOQ" defense to "hiring and employing" discrimination based on religion, sex, or national origin, not available against such discrimination based on race or color, but as noted *supra* at 39-40 n. 20, the courts and the EEOC have construed the section extremely narrowly.

distinction . . . that discrimination on account of sex is any less reprehensible or any less protected than discrimination because of race."); *Local 186, Pulp Workers* v. *Minnesota Mining & Manufacturing Co.,* 304 F. Supp. 1284, 1287, 1289 (N.D. Ind. 1969) ("The court . . . does not and will not draw any legal distinctions between the seriousness and gravamen of acts and policies of sexual discrimination alleged herein and the more frequently litigated acts of racial discrimination . . . [T]his court cannot conclude that under the allegations herein presented, sexual discrimination differs in any significant way from racial discrimination as a form of class discrimination."). Congress expressed the same view when it enacted the Equal Employment Opportunity Act of 1972, 86 Stat. 103:

> In recent years, the courts have done much to create a body of law clearly disapproving of sex discrimination in employment. Despite the efforts of the courts and the Commission, discrimination against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable.
>
> This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination. (citations omitted)

H.R. Rep. No. 92-238, 92d Cong., 1st Sess., 5 (1971). *Accord*: S. Rep. No. 92-415, 92d Cong., 1st Sess., 7-8 (1971). Thus, this Court's *Aiello* holding that a legislature's pregnancy classification did not constitute a sex-based classification under the equal protection clause, absent discriminatory intent, has no bearing on the Title VII determination that a pregnancy classification is sex-based.

D. *Legislation Enacted Pursuant to the Commerce Clause or Section Five of the Fourteenth Amendment May Reach Further Than Practices Prohibited by the Equal Protection Clause.*

The basis for congressional authority to enact Title VII was the commerce clause, the source of other sweeping legislation designed to regulate employment relationships and eradicate congressionally perceived discrimination. *See* 110 Cong. Rec. 1528, 7202-12, 8452-56. In *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937), for example, which upheld Congress' power to regulate employer-employee relations affecting commerce under the National Labor Relations Act, the Court declared:

> The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection or advancement" [citation omitted]; to adopt measures "to promote its growth and insure its safety" [citation omitted]; "to foster, protect, control, and restrain." [citation omitted] That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it."

Id. at 36-37. *See also United States* v. *Darby,* 312 U.S. 100, 115 (1941) (upholding Fair Labor Standards Act); *NLRB* v. *Fainblatt,* 306 U.S. 601, 604 (1939). Similarly, *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241 (1964), upheld congressional power under the commerce clause to outlaw race discrimination in public accommodations through Title II of the 1964 Civil Rights Act. *See also Katzenbach* v. *McClung,* 379 U.S. 294, 303-304 (1964).

As the Court of Appeals for the Second Circuit declared in *Communication Workers of America* v. *American Telephone & Telegraph Co., supra*:

> Under the Commerce Clause, Congress plainly has the power to prohibit by statute various forms of discrimination in private employment which it deems would adversely affect the flow of interstate commerce. [citation omitted]
>
> Title VII is legislation of this nature, designed to prohibit a broad spectrum of discriminatory evils which Congress deemed would have such an adverse effect. There is no requirement that the discriminatory practices forbidden by this statute should be limited to practices violative of the Equal Protection Clause. Practices forbidden by Title VII and the EEOC guidelines issued thereunder may, nonetheless, be able to survive Equal Protection attack.

513 F. 2d at 1031. *Accord, Satty* v. *Nashville Gas Co., supra.* In a footnote, the court added:

> This [the Commerce Clause power] is in addition to the Congressional power under Section 5 of the Fourteenth Amendment to enforce, by appropriate legislation, the dictates of the Equal Protection Clause. That power may reach more broadly than the Equal Protection Clause itself. See *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966); *United States* v. *Guest,* 383 U.S. 745, 781-784 (1966) (Brennan, J., concurring and dissenting). See also *Vineyard* v. *Hollister Elementary School District,* 64 F.R.D. 580, 585 (N.D. Cal. 1974).

513 F. 2d at 1031 n. 12.

In conclusion, Liberty Mutual's facile question of Title VII and the fourteenth amendment is unsupported by precedent and flouts Congressional policy. The equation has been rejected in an array of recent decisions. The Court is not confronted in this case, as it was in *Aiello,* with the minimum commands of the equal protection principle. Instead, it has before it the grand design of Congress to eliminate job market conduct that has so long confined women's opportunities and denied them a fair chance to participate fully in the nation's commerce. EEOC's guidelines, while inapposite in *Aiello,* are here entitled to the great deference accorded them by the court below and in all reasoned decisions addressed to the issue now in controversy.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Third Circuit should be affirmed, and Liberty Mutual's denial of disability income protection benefits to women disabled by pregnancy and related conditions should be declared violative of Title VII of the 1964 Civil Rights Act.

Respectfully submitted,

Ruth Bader Ginsburg
Melvin L. Wulf
Kathleen Willert Peratis
Susan C. Ross
Eve Cary
Helene Burgess
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

David Rubin
Joel D. Gewirtz
National Education Association
1201 16th Street, N.W.
Washington, D.C. 20036

Attorneys for the American Civil Liberties Union and National Education Association as Amici Curiae

September, 1975

Supreme Court, U. S.
FILED
SEP 27 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A Corporation,
Petitioner,

vs.

SANDRA WETZEL and MARI ROSS,
on behalf of Themselves
and all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit

BRIEF AMICI CURIAE OF CENTER FOR CONSTITUTIONAL RIGHTS, EMPLOYMENT LAW CENTER, EQUAL RIGHTS ADVOCATES, INC., NATIONAL ORGANIZATION FOR WOMEN, UNION WAGE, WOMEN'S LEGAL DEFENSE FUND, WOMEN ORGANIZED FOR EMPLOYMENT ON BEHALF OF RESPONDENTS

SYLVIA ROBERTS,
General Counsel.
MARILYN HALL PATEL,
JUDITH LONNQUIST,
NOW Legal Defense and
Education Fund,
9 West 57th Street,
New York, New York 10019.

WENDY W. WILLIAMS,
Equal Rights Advocates, Inc.
433 Turk Street,
San Francisco, California 94102.

RHONDA COPELON,
Center for Constitutional Rights,
853 Broadway,
New York, New York 10003.

GLADYS KESSLER,
Women's Legal Defense Fund,
1424 - 16th Street, N.W.,
Washington, D.C. 20009.
Attorneys for Amici Curiae.

PETER HART WEINER,
Professor of Law,
University of San Francisco.
Of Counsel.

PERRAU - WALSH PRINTING CO. - 992 MISSION STREET - SAN FRANCISCO, CA. 94103

12371-8-75

Subject Index

Page

Interest of amici curiae 1

Introduction and summary of argument 4

Argument 7

I. The employer policies of excluding pregnancy and childbirth disabilities from income protection plans are vestiges of outmoded attitudes toward, and adversely affect the employment opportunities of, working women 7

A. Employer pregnancy policies are the vestiges of outmoded attitudes toward working women 9

B. Employer pregnancy policies undermine the job security and opportunity of all working women... 22

C. Employer pregnancy policies penalize and burden working women's procreative choice 31

II. The higher cost of disability coverage for women is due to their concentration in low paid jobs rather than their gender, and the cost of adding childbirth disabilities to income protection coverage is moderate 34

A. Salary level rather than the sex of the individual determines the disability incidence rate 36

B. The cost of adding childbirth disabilities to Liberty Mutual's income protection plan is moderate 42

III. Title VII prohibits discrimination against women under employer pregnancy policies 45

Conclusion 54

Table of Authorities Cited

Cases

Albermarle Paper Co. v. Moody, ... U.S. ....., 95 S.Ct. 2362 (1975) 47, 50
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 35
Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975) 33

Bartmess v. Drewrys USA, Inc., 444 F.2d 1186 (7th Cir. 1971) 35
Black v. School Committee of Malden, 310 N.E.2d 330 (S. Ct. Mass. 1974) 21, 23
Bradley v. Cothern, 384 F.Supp. 1216 (E.D. Tex. 1974) .. 21
Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) 10
Buckley v. Coyle Public School Systems, 476 F.2d 92 (10th Cir. 1973) 20, 33

Carter v. Panama Canal Company, 463 F.2d 1289 (D.C. Cir. 1972) 49
Cerra v. East Stroudsburg Area School District, 450 Pa. 207, 299 A.2d 277 (S.Ct. Pa. 1973) 21
Cheatwood v. South Central Bell Telephone & Telegraph Co., 303 F.Supp. 754 (M.D. Ala. 1969) 29
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 31, 32
Communications Workers of America v. American Telephone and Telegraph Company, 513 F.2d 1024 (2d Cir. 1975) 49
Crawford v. Cushman, 378 F.Supp. 717 (D. Vt. 1974) 21

Eisenstadt v. Baird, 405 U.S. 438 (1972) 31
Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973) 46, 47, 50

Flores v. Secretary of Defense, 355 F.Supp. 93 (N.D. Fla. 1973) 21
Frontiero v. Richardson, 411 U.S. 677 (1973) 41

Geduldig v. Aiello, 417 U.S. 484 (1974) 2, 43, 44, 45, 49
Gilbert v. General Electric Company, 375 F.Supp. 367 (E.D. Va. 1973) 20, 32, 33
Gilbert v. General Electric, ... F.2d ....., 10 Emp. Prac. Dec. ¶ 10,269 (4th Cir. June 27, 1975) 49, 50, 51

Pages
Godwin v. Patterson, 363 F.Supp. 238 (M.D. Ala. 1973) ... 21
Green v. Waterford Board of Education, 473 F.2d 629 (2d Cir. 1973) 20
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 47, 50
Griswold v. Connecticut, 381 U.S. 479 (1964) 31, 33

Heath v. Westerville Board of Education, 345 F.Supp. 501 (S.D. Ohio 1972) 20
Holthaus v. Compton & Sons, 514 F.2d 651 (8th Cir. 1975) 32, 50
Hutchinson v. Lake Oswego School District, ... F.2d ....., 10 Emp. Prac. Dec. ¶ 10,325 (9th Cir. July 21, 1975) .. 32, 33, 50

Katzenbach v. Morgan, 384 U.S. 641 (1966) 46
Kornblum v. Newark Unified School District, 37 Cal.App. 3d 623, 112 Cal. Rptr. 457 (1974) 21, 25

LaFleur v. Cleveland Board of Education, 465 F.2d 1184 (6th Cir. 1972) 20
Lassiter v. Northampton County Bd. of Election, 360 U.S. 45 (1959) 46

Manhart v. City of Los Angeles, 387 F.Supp. 980 (C.D. Cal. 1975) 35

Newmon v. Delta Airlines, Inc., 475 F.2d 768 (5th Cir. 1973) 32

Oregon v. Mitchell, 400 U.S. 112 (1970) 46

Paxman v. Wilkerson, 390 F.Supp. 442 (E.D. Va. 1975) .. 21

Reed v. Reed, 404 U.S. 71 (1971) 48
Robinson v. Rand, 340 F.Supp. 37 (D. Colo. 1972) 33
Roe v. Wade, 410 U.S. 113 (1973) 31
Rosen v. Public Service Electric and Gas Co., 477 F.2d 90 (3d Cir. 1973) 35, 48
Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) 35
Russell v. Princeton Laboratories, 66 LRRM 2350 (1967) .. 28

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 31

Pages

Satty v. Nashville Gas Company, ___ F.2d ___, 10 Emp. Prac. Dec. ¶ 10,359 (6th Cir. Aug. 8, 1975) 26, 27

School District No. 1 v. Nilsen, 523 P.2d 1041 (C.A. Ore. 1974) 21, 23

Seaman v. Spring Lake Park Independent School District, 363 F.Supp. 944 (D. Minn. 1973) 20

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) 31

Snyder v. Massachusetts, 291 U.S. 97 (1934) 31

Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir. 1971) 48

Stanton v. Stanton, ___ U.S. ___, 95 S.Ct. 1373 (April 15, 1975) 30

Taylor v. Louisiana, ___ U.S. ___, 95 S.Ct. 692 (Jan. 21, 1975) 30

Weinberger v. Wiesenfeld, ___ U.S. ___, 95 S.Ct. 1225 (March 19, 1975) 30

Wetzel v. Liberty Mutual Insurance Company, 372 F.Supp. 1146 (W.D. Pa. 1974) 39, 44

Wetzel v. Liberty Mutual Insurance Company, 508 F.2d 239 (3d Cir. 1975) 39

Wetzel v. Liberty Mutual Insurance Company, 511 F.2d 199 (3d Cir. 1975) 49

Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084 (5th Cir. 1975) 34

Zichy v. City of Philadelphia, 392 F.Supp. 338 (E.D. Pa. 1975) 26, 27

Constitutions

United States Constitution:
Fourteenth Amendment 45, 46, 48

Statutes

5 U.S.C.:
Section 6307 52

20 U.S.C.:
Section 1681 52

42 U.S.C.: Pages
Section 2000a-2(a)(1)(2) 47
Section 2000e-2(a)(2) 6

45 U.S.C.:
Section 351(k)(2) 52

29 C.F.R.:
Section 1604.10 ..... 20, 50
Section 1604.10(b) 50

45 C.F.R.:
Section 86.57(c), 40 *Fed. Reg.* 24144 (June 4, 1975) .. 52
Section 86.40, 40 *Fed. Reg.* 24142 (June 4, 1975) 52

Department of Health, Education and Welfare, Higher Education Guidelines, 37 *Fed. Reg.* 24686 (1972) 20

Miscellaneous

D. Allen, *Fringe Benefits: Wages or Social Obligations?* (Rev. Ed. 1969) 11, 18, 22, 28

A. Bixby, "Statistics and Estimates for the United States Railroad Sickness Benefit Programme", *Bulletin of the International Social Security Association* (June 1958) .. 19

California Dept. of Human Resources Development, *Female & Minority Labor Force Estimates,* Report 400F (Oct. 22, 1973) 37

California Dept. of Industrial Relations, Division of Labor Statistics and Research, *California Work Injuries of 1973,* (Dec. 1974) 37

W. Chafe, *The American Woman* (1972) 11, 12, 17

Citizens Advisory Council on the Status of Women, *Women in 1971* (1972) 36, 42

Comment, "Love's Labors Lost: New Conceptions of Maternity Leaves," 7 Harv. Civ. Rts. & Civ. Libs. L. Rev. 260 (1972) 20

110 *Cong. Rec.* 2728 (88th Cong., 2d Sess., Feb. 10, 1964) 48

118 *Cong. Rec.* 4507 (92d Cong., 2d Sess., Feb. 17, 1972) .. 39, 40

"Effects of Cutbacks on Women's Employment," *Monthly Labor Review,* Vol. 59, No. 3 (1944) 16

Pages

"Employers' Postwar Plans for Women Workers," *Monthly Labor Review*, Vol. 60, No. 6 (1945) 16

H. Fox, "The Corporate Social Security System and Workman's Compensation," *Conference Board Record* (Feb. 1974) 22

"Frequency and Duration of Disability Among Company Employees in 1971-72," *Metropolitan Life Statistical Bulletin* Vol. 55 (Oct. 1974) 37

C. Greenwald, "Maternity Leave Policy," *New England Economic Review* (Federal Reserve Bank of Boston, Jan.-Feb. 1973) 42, 43

H. Hayghe, "Labor Force Activity of Married Women," *Monthly Labor Review*, Vol. 96, No. 4 (1973) 30

"Health-Benefit Programs Established Through Collective Bargaining," *Monthly Labor Review*, Vol. 61, No. 2 (1945) 19

House Report No. 92-238, 92d Cong. 2d Sess. 8 (1971) ... 51

International Labour Office, *The War and Women's Employment* (Montreal, 1946) 13, 16

E. D. Koontz, "Childbirth and Child Rearing Leave: Job-Related Benefits," 17 N.Y.L. Forum 480 (1971) 20, 44

D. Loth, *Swope of G.E.: Story of Gerard Swope and General Electric in American Business* (1958) 12

A. MacLean, *Women Workers and Society* (1916) 10

B. Mandel, *Samuel Gompers* (1963) 11

J. Mohr, "The Industrial Nurse and the Woman Worker," (Women's Bureau Spec. Bull. No. 19, 1944) 13

National Industrial Conference Board, *Conference Board Report* (1964) 19

National Industrial Conference Board, *Profile of Employee Benefits*, Conference Board Report No. 645 (1974) 21

V. Oppenheimer, *The Female Labor Force in the United States* (1970) 8

M. Pidgeon, "Women Workers and Recent Economic Change," *Monthly Labor Review*, Vol. 65, No. 6 (1947) 17

Pages

"Policy of War Manpower Commission on Women Workers," *Monthly Labor Review*, Vol. 56, No. 4 (1943) 13

Prentice-Hall Survey of Maternity Leave Policies, Report Bulletin 25, Vol. XIX (June 6, 1972) 8

President's Commission on the Status of Women, *Report of the Committee on Federal Employment* (1963) 42, 52

President's Commission on the Status of Women, *Report of the Committee on Protective Labor Legislation* (1963) .. 15

L. Pruette, *Women Workers Through the Depression* (1934) 12

R. Quinn, *et al.*, "Evaluating Working Conditions in America," *Monthly Labor Review*, Vol. 96, No. 5 (1973) 20, 25

Report of the Twentieth Century Fund Task Force on Women and Employment: Exploitation from 9 to 5 (1975) 8, 29

S. Risenfeld, *Temporary Disability Insurance*, Hawaii Legislative Reference Bureau Report No. 1 (1969) 38

San Francisco Chronicle (Mon., Sept. 1, 1975) 27

I. Sawhill, "Discrimination and Poverty Among Women Who Head Families," *Signs: Journal of Women in Culture and Society* (Dec. 1975) 30

Senate Report No. 92-415, 92d Cong., 1st Sess. 5 (1971) ..46, 51

C. Silverman, "Maternity Policies in Industry," 8 *The Child* 20 (Aug. 1943) 13, 14, 15

"Standards for Women's Employment in Wartime," *Monthly Labor Review*, Vol. 56, No. 6 (1943) 13

G. Swope, "Management Cooperation with Workers for Economic Welfare," *The Annals of the American Academy of Political and Social Science*, Vol. 154 (March 1931) 12

F. Thorne, *Samuel Gompers: American Statesman* (1957) 11

"Touchy Problem," *Business Week* (Sept. 25, 1943) 13

U.S. Bureau of the Census, "Fertility Expectations of American Women: June 1974," *Current Population Reports*, Series P-20, No. 277 (1975) 22

Pages

U.S. Bureau of the Census, "Money Income in 1973 of Families and Persons in the United States," *Current Population Reports*, Series P-60, No. 97 (1975) 27

U.S. Bureau of the Census, *Persons with Work Disability: 1970* (Jan. 1973) 36, 37, 38

U.S. Bureau of the Census, *Statistical Abstract of the United States, 1974* (1974) 27

U.S. Dept. of Health, Education and Welfare, "Social Security Programs Throughout The World," Research Report No. 40 (1971) 22

U.S. Department of Health, Education and Welfare, "Wife's Earnings as a Source of Family Income," Social Security Administration, Research and Statistics Note No. 10 (1974) 27

U.S. Dept. of Health, Education and Welfare, Public Health Service, *Acute Conditions, Incidence and Associated Disability—U.S. July 1972-June 1973*, Vital and Health Statistics Series 10, No. 98 (1974) 37

U.S. Dept. of Health, Education and Welfare, Public Health Service, *Age Patterns in Medical Care, Illness & Disability. United States: 1968-1969* (1972) 36

U.S. Dept. of Health, Education and Welfare, Public Health Service, *Current Estimates from the Health Interview Survey, United States: 1972*, Vital and Health Statistics Series 10, No. 85 (1973) 36

U.S. Dept. of Health, Education and Welfare, Public Health Service, *Disability Days: 1968*, Vital & Health Statistics Series 10, No. 67 (1972) 36

U.S. Dept. of Health, Education and Welfare, Public Health Service, *Time Lost from Work Among Currently Employed Population, United States: 1968*, Vital and Health Statistics, Series 10, No. 71 (1972) 34, 36, 38

U.S. Dept. of Labor, *Employment and Earnings* (June, 1975) 43

U.S. Depts. of Labor and Health, Education and Welfare, *Manpower Report of the President* (1975) ..8, 15, 17, 21, 29, 30

Pages

U.S. Women's Bureau, "Facts About Women's Absenteeism and Labor Turnover" (August 1969) 37

U.S. Women's Bureau, "Maternity Benefit Provisions for Employed Women," Bulletin No. 272 (1960) 19

U.S. Women's Bureau, "State Labor Laws for Women with Wartime Modifications," Bulletin No. 202-III (1945) 15

U.S. Women's Bureau, *Union Provisions for Maternity Leave for Women Members*, Union Series No. 3 (1945) 15

"Women's Tendency to Leave the Labor Market," *Monthly Labor Review*, Vol. 59, No. 5 (1944) 16

"Women War Workers' Post-War Job Plans," *Monthly Labor Review*, Vol. 59, No. 3 (1944)..... 16

"Women Will Stay," *Business Week* (May 12, 1945) 16

"Workers' Wives Go First," *Business Week* (Jan. 29, 1944) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A Corporation,
Petitioner,

vs.

SANDRA WETZEL and MARI ROSS,
on behalf of Themselves
and all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICI CURIAE OF CENTER FOR CONSTITUTIONAL RIGHTS, EMPLOYMENT LAW CENTER, EQUAL RIGHTS ADVOCATES, INC., NATIONAL ORGANIZATION FOR WOMEN, UNION WAGE, WOMEN'S LEGAL DEFENSE FUND, WOMEN ORGANIZED FOR EMPLOYMENT ON BEHALF OF RESPONDENTS

INTEREST OF AMICI CURIAE*

The Center for Constitutional Rights is a non-profit, tax-exempt legal and educational corporation con-

*This brief is filed with the consent of the parties. The letters of consent have been filed with the Clerk of the Court.

cerned with advancing and protecting the rights and liberties guaranteed by the Bill of Rights to the United States Constitution. The Center has been in the forefront of litigation to assure the liberty and equality of women under the law, particularly freedom of choice to procreate under the due process clause of the Constitution.

The Employment Law Center, a project of the Legal Aid Society of San Francisco, provides free legal assistance to poor residents of San Francisco in a concentrated effort to secure and enhance their rights to equal employment opportunity. The Center represents large numbers of poor working women who are acutely affected by disability programs which —like Liberty Mutual's program—do not provide compensation for pregnancy-related disabilities.

Equal Rights Advocates, Inc. is a non-profit, tax-exempt legal and educational corporation dedicated to promoting the equal rights under the law of women and men. Lawyers for ERA, Inc. devote substantial amounts of time and energy to advancing the employment rights of women through negotiation, public education and litigation, and have participated as counsel and amicus curiae in a number of cases involving discrimination against pregnant women, including *Geduldig v. Aiello,* 417 U.S. 484 (1974).

The National Organization for Women (NOW) is a national membership organization of women and men organized to bring women into full and equal participation in every aspect of American society. Its membership consists of large numbers of working

women who are directly affected by disability programs similar to that of defendant Liberty Mutual.

The Union Women's Alliance to Gain Equality (Union WAGE) is a national membership organization of working women, including women on welfare and unemployed women, organized to gain equal rights, equal pay and equal opportunity for women in their unions and from their employers. Union WAGE's membership includes substantial numbers of working women who are directly affected by disability programs similar to that of defendant Liberty Mutual.

The Women's Legal Defense Fund is a non-profit, tax-exempt organization founded in 1971 whose objective is to provide legal representation and counselling to persons who are challenging sexually discriminatory laws and practices. To achieve this end, the fund has brought test litigation, presented its views as amicus curiae, provided legal counselling on domestic relations and employment discrimination issues, filed comments before administrative agencies at both the federal and local levels, and conducted information seminars as a public service to the community.

Women Organized for Employment (WOE) is a non-profit organization in the San Francisco Bay Area committed to the achievement of equal employment opportunity for women. Through job counselling and educational programs for women job-seekers and for employers, WOE seeks to eradicate any employment practice that discriminates on the basis of sex, including discrimination against pregnant women.

These organizations participate in this case as *amici* because each of them, through their members, participants or clients, have substantial experience with the operation and adverse effects of employer pregnancy rules upon working women. Because of this experience, each has concluded that the achievement of even-handed treatment of pregnant women and women suffering from pregancy-related disabilities is essential to the achievement of full equality for working women.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is the goal of this brief not to repeat the legal arguments of the respondents but rather to lay the factual foundation for what respondents contend is the proper legal resolution of this case. *Amici* herein explore the historical causes and the present effects of employer pregnancy policies upon working women, the large majority of whom become pregnant at some time in their working lives.

Employer pregnancy rules are an integral part of a complex of employer practices which are based upon the assumption that women who work are marginally attached to the labor force, that they should and will place home and family above job, and that, in the normal course of events, they will marry, become pregnant and leave the workforce. Based on these assumptions, employers historically refused to hire married women at all, or fired them when they became pregnant. Later, in the 1940's and 1950's, under pressure from the government and organized labor,

these harsh measures began to yield as many employers substituted mandatory maternity leaves for outright dismissal. (Section I-A.)

Today, a broad range of employer pregnancy policies undermine the job security and continuity of working women, affecting their seniority, promotional opportunities, wages and fringe benefits in ways that can be carried forward over their entire work lives. If such consequences were ever justified by the work-life pattern of women, they are no longer. The proportion of working women, particularly mothers of young children, has increased dramatically in recent decades, and it is now apparent that women are in the work force to stay. (Section I-B.)

Moreover, employer pregnancy rules penalize the choice to bear a child by conditioning that choice upon the short and long term sacrifice of employment security and opportunity and the concomitant suffering of economic hardships against which all other temporarily disabled workers are protected. (Section I-C.)

The modern justification for placing pregnant women on unpaid leaves of absence rather than treating pregnancy- and childbirth-related disabilities like other disabilities is that the cost of covering such disabilities is excessive. The employers who have submitted briefs in this case buttress that argument by asserting that women already receive a disproportionate share of benefits under income protection plans. Such contentions omit the reality that temporary disability insurance is but one of several income protection plans used by employers to compensate disa-

bility days, under some of which men typically cost an employer more than women do. They also confound cause with effect because low income workers, not women, have a higher incidence of disability. The disproportionate concentration of women in low paying jobs is the major cause of women's apparently higher incidence of disability. An analysis of the pay and position of women in comparison to men in Liberty Mutual's and American Telephone and Telegraph Company's workforces strikingly demonstrates why their women employees account for more of their paid disability days than men do. (Section II-A.)

Moreover, Liberty Mutual's estimates of the additional cost of covering childbirth disabilities is grossly exaggerated, and, in any event, was not the basis for its choice to exclude pregnancy and childbirth disabilities from its income protection plan. (Section II-B.)

Congress, in passing Title VII, broadly intended the act to strike the whole spectrum of employer practices which deprive women and minorities of equal employment opportunity. Title VII therefore prohibits classification of employees "*in any way* which would deprive *or tend to deprive* any individual of employment opportunities *or otherwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. §2000e-2(a)(2). Because employer pregnancy rules stem from outmoded stereotypes about women and deeply affect their employment status and opportunities, they are firmly within the scope of coverage of Title VII. That Congress so

intended is evident not only from the intent and scope of the Act itself but also from Congressional and governmental treatment of pregnancy- and childbirth-related disabilities under other federal legislation. The most recent demonstration of this intent is Congress' approval of regulations issued pursuant to an act prohibiting sex discrimination by educational institutions which are virtually identical to the Equal Employment Opportunity Commission's pregnancy guidelines. (Section III.)

ARGUMENT

I. THE EMPLOYER POLICIES OF EXCLUDING PREGNANCY AND CHILDBIRTH DISABILITIES FROM INCOME PROTECTION PLANS ARE VESTIGES OF OUTMODED ATTITUDES TOWARD, AND ADVERSELY AFFECT THE EMPLOYMENT OPPORTUNITIES OF, WORKING WOMEN.

At the core of the sex stereotypes resulting in the disparate treatment of men and women is the assumption that women will marry, become pregnant and leave the labor market. Based upon this prediction, employers assume low career aspirations in women and are reluctant to provide education and training to their women workers, to hire them into high level jobs, or to place them in jobs apt to lead to promotion. On the assumption that women will place family first, employers expect high turnover from women and therefore place them in low skill, low status jobs for which such "traits" are expected. Pay in these "women's jobs" reflects the general assessment of the woman worker as a marginal worker,

with no serious commitment to career, and assumes her natural complement, a breadwinner husband. See, generally, U.S. Dep'ts. of Labor and Health, Education, and Welfare, *Manpower Report to the President* (1975), p. 69; V. Oppenheimer, *The Female Labor Force in the United States* (1970), pp. 104-5, 109-14; *Report of the Twentieth Century Fund Task Force on Women and Employment: Exploitation from 9 to 5* (1975), p. 66.

Employer pregnancy rules are an integral part of the complex of employer practices resulting from the assumption that women will marry, become pregnant and leave the workforce. Perhaps inevitably, they are the most deeply illustrative of the operation of the stereotype, because the pregnancy of a worker is viewed by employers as the confirmation that she is participating in the expected pattern.[1]

---

[1]A sophisticated rendition of this view is the assertion in this case by employers such as Liberty Mutual and American Telephone and Telegraph Company that the payment of disability benefits to women disabled by childbirth would constitute a "unique form of severance pay," despite the fact that a substantial and growing number of women return to work after childbirth. While return rates differ among companies and are no doubt affected by the kind of leave provided, the return rate of women employees who take a leave for childbirth is generally high. A Prentice-Hall survey revealed that most women who take a leave return to work:

> We asked survey respondents to tell us what proportion of their employees who were pregnant in 1971 quit their jobs and what proportion took a leave. . . . [H]alf the plants, one-third of the office firms . . . said that 75% or more of the employees who are pregnant elected to take a leave. (In many cases, 100% of the employees took a leave). . . . More than half reported a perfect score on "returns"—that is, all the employees who elected [to take] a leave actually returned to work as scheduled.

Prentice-Hall Survey of Maternity Leave Policies, Report Bulletin 25, Vol. XIX (June 6, 1972), p. 463.

Employers' pregnancy policies have been tailored to reflect and even hasten these role expectations. The origins and history of these policies demonstrate that employers originally expressed such assumptions by refusing to hire married women at all; they later modified this practice by permitting married women to work but fired them when they became pregnant. Finally, under pressure from the Labor Department and organized labor, they began to substitute mandatory leaves of absence for outright dismissal. From early times to the present, the benefits extended to other disabled workers to promote productivity and loyalty and to reduce absenteeism and turnover, such as job security, retention or accumulation of seniority, and wage replacement through sick leave or disability programs, have been denied to workers disabled by pregnancy and childbirth.

A. Employer Pregnancy Policies Are The Vestiges Of Outmoded Attitudes Toward Working Women.

The evolution of employer practices concerning pregnant workers demonstrates that assumptions about women's proper role—that of childbearing and rearing—are the reasons for most employer pregnancy practices, rather than modern day "neutral" cost rationales.

From early times in this country, the concept of the natural "sphere" or role of woman as wife, mother and homemaker has shaped and dictated her acceptance and treatment in the labor market. Justice Bradley of this Court spoke not only for the concurring

justices but for the society of his time when he proclaimed, in 1873, that :

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman . . . . The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institutions is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141, 21 L.Ed. 442 (1873) (concurring opinion of Bradley, J.).

While single and immigrant women were tolerated in the working world, wives of American workers were not:

> The American family standard has always been a bread-winning father, and a mother occupying herself with the care of her children. Any deviation from this custom is cause for comment. Pride on the part of our native workmen serves to keep their wives out of the ranks of wage earners.

A. MacLean, *Women Workers and Society* (1916), p. 39.

Even Samuel Gompers, the father of the American Federation of Labor and a supporter of the women's suffrage movement and equal pay for equal work, believed that the place of the married woman was in the home.

> I contend that the wife or mother, attending to the duties of the home, makes the greatest contribution to the support of the family. The honor, glory, and happiness that comes from a beloved wife and the holiness of motherhood are a contribution to the support and future welfare of the family that our common humanity does not yet fully appreciate. . . .

F. Thorne, *Samuel Gompers: American Statesman* (1957), p. 89 (quoting from *American Federationist,* January, 1906). When asked in 1905 by the *Woman's Home Companion* if the wife should contribute to her family by working for wages, he replied, "Positively and absolutely, 'No'." B. Mandel, *Samuel Gompers* (1963), p. 233.

The view that women belonged at home, rather than in the workforce, persisted into the 1920's. In an expression of the prevailing view, women participating in the American Institute of Banking convention in 1923 were told that they were "merely temporary employees" in the nation's banks and businesses and that their goal should be to return home. W. Chafe, *The American Woman* (1972), p. 64.

The 1920's also saw the beginning of what has since been called "the fringe benefit movement" among employers. D. Allen, *Fringe Benefits: Wages or Social Obligation?* (Rev. ed. 1969), pp. 23, 230. From its inception, there was evidence that in fringe benefits, as well as other terms and conditions of employment, the employers' view of women as marginal workers whose proper and expected role was wife and mother would limit the benefits made available to them.

Women were excluded altogether from some such fringe benefit programs. When, for example, the General Electric Company's sickness and accident insurance plan was altered from an employer-supported to contributory plan, women employees were not invited to participate. Gerard Swope, the president of General Electric, explained the exclusion by saying, "Frankly, our theory had been that women did not recognize the responsibilities of life, for they probably were hoping to get married soon and leave the company." D. Loth, *Swope of GE: Story of Gerard Swope and General Electric in American Business* (1958), p. 155; G. Swope, "Management Cooperation with Workers for Economic Welfare," *The Annals of the American Academy of Political and Social Science,* Vol. 154, pp. 131, 132 (March 1931).

The Depression of the 1930's intensified negative attitudes toward working married women. The practice of refusing to hire married women increased. A National Education Association study in 1930-31 showed that, of 1500 school systems surveyed, 77 percent refused to hire wives and 63 percent dismissed women teachers if they subsequently married. Whole cities campaigned for the firing of working wives, and most state legislatures considered bills to restrict the employment of married women. W. Chafe, *The American Woman* (1972), pp. 100, 108-109; L. Pruette, *Women Workers Through the Depression* (1934), pp. 104-105.

During World War II, the manpower shortage resulted in an unprecedented influx of women into the

labor force, and forced a reassessment of policies and practices affecting working women. The Government, through the Department of Labor, played an active role in seeking to make the working world more hospitable to women, including wives and mothers.[2] A primary concern of the Department of Labor was the prevailing employer practice of terminating women workers upon discovery of pregnancy. See, e.g., C. Silverman, "Maternity Policies in Industry," 8 *The Child* 20, 21 (Aug. 1943); J. Mohr, "The Industrial Nurse and the Woman Worker," (Women's Bureau Spec. Bull. No. 19, 1944), p. 29; "Touchy Problem," *Business Week* (Sept. 25, 1943), p. 80; International Labour Office, *The War and Women's Employment* (Montreal, 1946), pp. 230-233.

In December of 1942 and January of 1943, the Children's Bureau did an extensive national study of the working conditions of women. Among other things, the study investigated employer reasons for the termination of women as soon as they were known to be pregnant. Dr. Charlotte Silverman of the Research Division of the Children's Bureau reported that when employers were first asked why they fired women, many responded that they did it to protect the woman's health or because of the diminished efficiency of an employee who is pregnant. Pressed further, they

[2]The War Manpower Commission issued a statement of policy on recruitment, training and employing of women workers which recommended, *inter alia,* equal treatment of women workers in hiring, training and wages. See "Policy of War Manpower Commission on Women Workers," *Monthly Labor Review,* Vol. 56, No. 4 (1943), pp. 669-671; "Standards for Women's Employment in Wartime," *Monthly Labor Review,* Vol. 56, No. 6 (1943), p. 1120.

expressed a fear that pregnant women might miscarry, and blame her occupation. Both reasons were pretexts. Of all the employers surveyed only one reported an incidence of miscarriage, and "[a]ll the medical directors that were interviewed agreed that it is in the first three months of pregnancy that the danger of miscarriage is greatest and that practically all the pregnant women remained at work during this period, as it is unusual for pregnancy to be reported so early." C. Silverman, "Maternity Policies in Industry," *supra,* pp. 21-22.

Dr. Silverman further reported that many employers gave "esthetic and moral" reasons for terminating pregnant women:

> In many plants it was stated that it was "not nice" for obviously pregnant women to be working in a factory and that such employment had a bad effect on the male employees, who made it a subject of frequent comment and were distracted from their work.

Id. at p. 22.

To combat early dismissal of pregnant women, the Women's Bureau engaged in a campaign to educate employers about the economic needs of working women and the employer's economic interests in retaining trained and able-bodied workers beyond the early months of pregnancy. In addition, in July of 1942 it issued in conjunction with the Children's Bureau a statement of Standards for maternity care and employment of mothers in industry. In the Standards, the Women's Bureau recommended that pregnancy

not be grounds for dismissal. As an alternative, the Bureau recommended a "protective" leave period of not less than six weeks before delivery and two months after delivery, the latter limit to be extended upon a physician's recommendation. An important aspect of the Bureau's Standards was its recommendation that a woman be permitted to return to her former job, or if it were unavailable, another job of equivalent value, at the current wage paid for the job. Accumulation of seniority for 3½ months of the leave and retention of seniority thereafter and the use of sick leave and vacation pay were also recommended.[3] See, U.S. Women's Bureau, *Union Provisions for Maternity Leave for Women Members,* Union Series No. 3 (1945); C. Silverman, "Maternity Policies in Industry," ***supra,*** pp. 23, 24.

Despite its efforts and the support of organized labor, the Women's Bureau made little headway to-

---

[3]The laws of six states which required "protective" maternity leaves prior to and after childbirth during the War continued in force through the time Title VII was passed. See, U.S. Women's Bureau, "State Labor Laws for Women with Wartime Modifications", Bulletin, No. 202-III, (1945), pp. 11-12, Chart III; President's Commission on the Status of Women, ***Report of the Committee on Protective Labor Legislation*** (1963), p. 15. None of these laws required reemployment, retention of seniority rights or paid leaves.

Both the Philippine Islands and Puerto Rico had leave laws requiring maternity leaves for one month before and one month after childbirth. Unlike the six states with such provision, however, the two protectorates accompanied their leave requirements with a prohibition against firing pregnant women and a requirement that they be paid during their maternity leave.

Unemployment insurance laws of many states exacerbated the effect of employer terminations of pregnant women by restricting the availability of unemployment benefits both before and after childbirth. See, U.S. Dep'ts. of Labor and Health, Education and Welfare, ***Manpower Report of the President,*** (1975), pp. 72-73.

ward the acceptance of its Standards by the War's end. "Women Will Stay," *Business Week* (May 12, 1945), pp. 102-103. *Business Week* reported:

> A survey of 92 midwestern . . . war plants recently revealed that only five recognize maternity as a basis for leave, although in a number of others a contract provision covering illness sometimes is broadly construed as including pregnancy. In many plants, however, pregnancy is a basis for layoffs with resulting loss of seniority, vacation, and other length of employment rights.

Id. at 103.

And, as the men returned from war, attitudes toward women workers reverted almost overnight to those prevailing before the war. Despite indications that most of the women who entered the labor force during the national manpower shortage wished to continue working (see International Labour Office, *The War and Women's Employment, supra,* pp. 264-267; "Women War Workers' Post-War Job Plans," *Monthly Labor Review,* Vol. 59, No. 3 (1944), pp. 589-590), women were laid off in enormous numbers.[4] Some companies laid off, without regard to seniority, all wives with working husbands. See "Workers' Wives Go First," *Business Week* (Jan. 29, 1944), p. 103; "Employers' Postwar Plans for Women Workers," *Monthly Labor Review,* Vol. 60, No. 6, (1945) p. 1269. The lesson of World War II was clear, indeed: women were still the marginal workers,

[4]See, e.g., "Effects of Cutbacks on Women's Employment", *Monthly Labor Review,* Vol. 59, No. 3 (1944), p. 585; "Women's Tendency to Leave the Labor Market", *Monthly Labor Review,* Vol. 59, No. 5 (1944), p. 1029.

who, in time of national need, would be called upon to carry on the nation's work, but when the emergency was over, were sent home where they belonged. W. Chafe, *The American Woman, supra,* pp. 177-180.

Nonetheless, the wartime experience permanently changed the work aspirations and patterns of women. Many of those who were laid off from the higher paid war industries found work in traditional "women's" jobs[5] and their numbers steadily increased in the decades that followed.[6] See, generally, W. Chafe, *The American Woman, supra,* Chapter 8.

The management "fringe benefit movement" which began in the 1920's expanded dramatically after the War. The original motivation of employers in providing fringes in the 20's remained their primary motivation in the 50's and 60's— to increase productivity.

> "Company executives say their main reason for providing group insurance is to give their employees a sense of security. They feel that such freedom from worry will result in higher employee morale, better worker-management relations and increased productivity," wrote one management publication. Benefits "help to stabilize work forces," said a company official in *Factory* magazine. "They create job satisfaction and inspire employees to greater productivity."
>
> . . .
>
> *Business Management* reported that 84 percent of employers responded affirmatively in a survey

[5]M. Pidgeon, "Women Workers and Recent Economic Change," *Monthly Labor Review,* Vol. 65, No. 6 (1947), pp. 668-669.

[6]The labor force participation rates of women rose from 33.9% in 1950 to 44.7% in 1973. *Manpower Report of the President* (1975), *supra,* p. 57.

> on the effects of fringe benefits on loyalty and stability of the work force. Selected samples from the files of the National Industrial Conference Board showed that "as a rule, employers regard what they spend on their benefit programs as an investment . . . to attract and hold good employees and motivate them to greater effectiveness."

D. Allen, *Fringe Benefits: Wages or Social Obligation?, supra,* pp. 243, 244.

Consistent with the management desire to increase productivity through fringe benefits was its efforts to control the fringe benefit money to maximize that aim. This was done through careful control and limitation on eligibility for fringe benefits so that they would be allocated to employees who employers thought would yield the highest productivity return. *Id.* at 244, 246. Women workers, particularly those who became pregnant, inevitably fell victim once again to assumptions concerning their work-force commitment and received the short end of the fringe benefit stick. In the spirit of Gerard Swope of General Electric, women's coverage under fringe benefit programs was less than men's. Under health and income protection plans,[7] women employees sometimes received lower weekly benefits than men, some programs

[7]The record before this court provides one such example. A group life insurance program instituted by Liberty Mutual in 1953 and in effect until 1967 contained three schedules, a basic schedule, a men's technical schedule, and a senior schedule. Under the basic schedule, paid for by the company, each employee received $3,000 worth of life insurance after three months of service. After ten years and three months service, employees were eligible to subscribe to the senior schedule for $25,000 worth of insurance. In addition, men in technical jobs could subscribe to the technical men's schedule, under which they received an additional $2,000 in coverage each year until the tenth year of employment. Women employees were excluded from this special additional life insurance coverage. App., p. 37.

limited the coverage of disabilities of female "generative organs,"[8] and those health and disability plans that did cover pregnancy-related medical expenses and disabilities most often provided coverage more limited than for other illnesses and disabilities.[9]

By 1964, the effective date of Title VII, more than forty percent of companies surveyed by the National Industrial Conference Board still did not even provide unpaid maternity leaves of absence for women. Among those which did, more than half placed women on leave before the seventh month of pregnancy. Only six percent of the companies with a paid sick leave program included pregnancy and childbirth disability in the program. National Industrial Conference Board, *Conference Board Report* (1964), pp. 121-122.[10]

[8]See "Health Benefit Programs Established Through Collective Bargaining", *Monthly Labor Review,* Vol. 61, No. 2 (1945), pp. 199, 203, 208.

[9]Typical clauses provided disability benefits for 13 to 52 weeks for all disabilities except pregnancy or childbirth related disability, which was covered for a maximum of six weeks. Hospitalization was often covered for 31 days but limited to 12 or 14 days for conditions resulting from pregnancy and childbirth. See, "Health-Benefit Programs Established Through Collective Bargaining", *Monthly Labor Review, supra,* pp. 193-194, 199.

[10]The federal government has long practiced what it preached to private industry during the war. Under a regulation of the Civil Service Commission, women can use their accrued sick leave for pregnancy and childbirth disabilities. And in 1946, Congress amended the Railroad Unemployment Insurance Act to include sickness benefits. "Maternity" benefits were explicitly covered in the sickness benefit amendment. See, U.S. Women's Bureau, "Maternity Benefit Provisions for Employed Women", Bulletin No. 272 (1960), pp. 22, 27. A. Bixby, "Statistics and Estimates for the United States Railroad Sickness Benefit Programme", *Bulletin of the International Social Security Association* (June, 1958).

In the period between 1969 and 1973, a period characterized by increased awareness of the adverse effects of pregnancy policies on working women on the part of government agencies,[11] legal scholars,[12] and the courts,[13] there was a marked improvement in employer practices. R. Quinn, *et al.*, "Evaluating Working Conditions in America," *Monthly Labor Review,* Vol. 96, No. 5 (1973), pp. 32, 37. In 1973, seventy-three percent of the women workers surveyed by Quinn reported that they were entitled to maternity leave with full reemployment rights as compared to 59 percent in 1969. Twenty-six percent reported the availability of maternity leave with pay as com-

[11]See, 29 C.F.R. § 1604.10. See also, Department of Health, Education and Welfare, Higher Education Guidelines, 37 Fed. Reg. 24686 (1972).

[12]See, E.D. Koontz, "Childbirth and Child Rearing Leave: Job Related Benefits", 17 N.Y.L.F. 480 (1971); Comment, "Love's Labors Lost: New Conceptions of Maternity Leaves", 7 Harv. Civ. Rts. & Civ. Libs. L. Rev. 260 (1972).

[13]See, *LaFleur v. Cleveland Board of Education,* 465 F.2d 1184 (6th Cir. 1972) (school board maternity leave rule violates equal protection); *Gilbert v. General Electric Company,* 375 F.Supp. 367 (E.D. Va. 1973) (employer's sickness and accident benefit policy with no provision for pregnancy disability sexually discriminatory and violative of Civil Rights Act); *Buckley v. Coyle Public School Systems,* 476 F.2d 92 (10th Cir. 1973) (claim regarding validity of school system maternity leave policy presented constitutional issues of sufficient substance to hear case on merits); *Green v. Waterford Board of Education,* 473 F.2d 629 (2d Cir. 1973) (school board maternity leave rule violative of Civil Rights Act); *Seaman v. Spring Lake Park Independent School District,* 363 F.Supp. 944 (D. Minn. 1973) (preliminary injunction granted against school district which attempted to force teacher to take leave of absence; teacher's ability to teach was not impaired); *Heath v. Westerville Board of Education,* 345 F.Supp. 501 (S.D. Ohio 1972) (school board maternity leave rule violative of equal protection because pregnancy treated differently from other medical disabilities.

pared to fourteen percent in 1969. *Id.* at 37, Table 4. See also, U.S. Dept's of Labor and Health, Education and Welfare, *Manpower Report to the President* (1975), p. 72; National Industrial Conference Board, *Profile of Employee Benefits,* Conference Board Report No. 645 (1974), p. 42.

Yet today, despite substantial improvements, many women are still fired for becoming pregnant, forced into maternity leaves before such leaves are medically necessary and prevented from returning to work when physically able.[14] And, alone among working women in industrialized countries of the world, women in this country are far more often than not

[14]*For terminations,* see, *e.g. Bradley v. Cothern,* 384 F.Supp. 1216 (E.D. Tex. 1974) (teacher fired for noncompliance with mandatory resignation requirement); *Crawford v. Cushman,* 378 F.Supp. 717 (D. Vt. 1974) (separation from service of pregnant women under Marine Corps regulations); *Godwin v. Patterson,* 363 F.Supp. 238 (M.D. Ala. 1973) (denial of maternity leaves to junior college teachers, forcing resignation); *Flores v. Secretary of Defense,* 355 F.Supp. 93 (N.D. Fla. 1973) (Naval discharge of unwed pregnant seaman); *Black v. School Committee of Malden,* 310 N.E. 2d 330 (S. Ct. Mass. 1974) (mandatory resignation at fourth month of pregnancy, ineligible for reinstatement until six months after childbirth); *School District No. 1 v. Nilsen,* 523 P.2d 1041 (C.A. Ore. 1974) (forced resignation of nontenured pregnant teachers); *Cerra v. East Stroudsburg Area School District,* 450 Pa. 207, 299 A.2d 277 (S. Ct. Pa. 1973) (forced resignation no later than end of the 5th month of pregnancy).

For mandatory leaves, see, *e.g., Paxman v. Wilkerson,* 390 F.Supp. 442 (E.D. Va. 1975) (termination of teachers with less than one year's service; teachers with more than one year's service receive mandatory leave at 5 months; teachers who learn of pregnancy before start of school year must request to be released from contracts); *Kornblum v. Newark Unified School District,* 37 Cal.App.3d 623, 112 Cal.Rptr. 457 (1974) (mandatory leave three months prior to delivery, no return before 3 months after childbirth or the following academic year, which ever comes first).

without income protection during the time they are unable to work because of childbirth.[15]

B. Employer Pregnancy Policies Undermine The Job Security And Opportunity Of All Working Women.

Women in the workforce, the significant majority of whom become pregnant at some point in their working lives,[16] are deeply affected by a wide range of employer practices relating to pregnancy. All of these practices are interpreted as violations of Title VII by the EEOC in its guidelines. Virtually all of them will be legal if petitioners prevail.

Termination of pregnant women is the most dramatic of these practices. Although termination is no longer the most common response to pregnancy, it is by no means unusual, as recent cases demonstrate. See, generally, cases cited in footnote 14, *supra*. Sometimes terminated women must seek work elsewhere after childbirth or reapply to their previous

[15]U.S. Dept. of Health, Education and Welfare, "Social Security Programs Throughout the World", Research Report No. 40 (1971), pp. xviii-xxiii. All countries in both Western and Eastern Europe have statutory programs of sickness and maternity benefits, as do all but five of the Western Hemisphere countries. In this country employers, partly in an effort to stave off such social legislation, created their own extensive fringe benefits programs. By the 1960's, the fringe benefits provided by employers were so comprehensive that one management writer concluded "it is now meaningful to label this web of employee benefit plans *the corporate social security system.*" H. Fox, "The Corporate Social Security System and Workman's Compensation," (*Conference Board Record* (Feb. 1974) p. 7 (emphasis in original), quoted in D. Allen, *Fringe Benefits: Wages or Social Obligation?* (1969), p. 249. See generally, *id.*, pp. 249-252, 254.

[16]Approximately 80 percent of all women bear children. See U.S. Bureau of the Census, "Fertility Expectations of American Women: June 1974," *Current Population Reports,* Series P-20, No. 277 (1975), Table 12.

employer on the same terms as a new hire; other employees, though rehiring is not guaranteed to them, if rehired will receive some recognition for former service. Examples of these contrasting approaches to rehiring after termination appear in *School District No. 1 v. Nilsen, supra,* 523 P.2d 1041 and *Black v. School Committee of Malden, supra,* 310 N.E.2d 330.

The school district in *Black* permitted teachers seeking reinstatement to return to their former positions at the same salary six months after childbirth, if such positions were still available. By contrast, in *Nilsen,* the school district required the resignation of untenured or probationary teachers who became pregnant. The district's policy that such a teacher, if rehired, lost credit toward tenure meant that the plaintiff, a third year probationary teacher, lost her opportunity to become tenured the following year and had to begin accumulating her credit anew.

Likewise, the petitioner in this case, Liberty Mutual, prior to 1967, terminated pregnant employees with no guarantee of reemployment, but would rehire if there was an opening. Upon rehiring, the women were treated like new hires, losing all credit for previous service to the company for purposes of fringe benefits. Under Liberty Mutual's income protection plan, for example, new hires were eligible for temporary disability benefits after three months and long-term disability coverage after five years. At the deposition of Liberty Mutual's personnel services manager, the effect of this policy upon such women was described as follows:

"Q. If I understand you correctly, if you had a female employee who was in your employ for ten years, she became pregnant, she would have been required to terminate her employment?

A. Correct.

Q. Then if she reapplied for employment and there was a position available and she was rehired, she would have lost whatever time had accrued under your income protection plan?

A. That's correct."

App., p. 44.

Under whatever terms, the effects of such terminations are severe for a woman whose income is critical to her family. She is likely to be ineligible for unemployment insurance, and if she seeks a job she is faced with potential employers who will not hire pregnant women. Even if she is lucky enough to be rehired by her former employers after childbirth, she is for the most part treated as a new employee, losing entirely the accumulated benefits from her prior service and finding herself in a job which may or may not have the same pay and responsibility as her previous job. In any case, she starts work all over again and must acquire job security, seniority, retirement rights, promotions, pay raises and fringe benefit eligibility anew. Her progress in the working world is necessarily permanently retarded.

Mandatory unpaid maternity leaves have a similar though somewhat mitigated effect on working women, depending in part on the duration of leave and the employment rights the employee is permitted to retain upon her return to work. Under some mandatory

leave policies, she cannot return for a designated period of time after childbirth;[17] under others, she *must* return by a certain date on pain of loss of certain employment rights or outright termination.[18] All these leave policies are arbitrary, since none takes into account the individual employee's health or ability to work, and all are different from the policies for other disabled workers.

Under most leaves, seniority does not continue to accumulate. Accumulated retirement, sick leave and vacation rights are often lost to the employee. R. Quinn, et al., "Evaluating Working Conditions in America," *Monthly Labor Review,* Vol. 96, No. 5 (1973), p. 37.[19]

The loss of retirement rights can, at the end of a woman's worklife, significantly postpone retirement, particularly if her leave occurred some years after she began working for her employer. The loss or nonaccumulation of seniority can have both immediate and long range effects. It can delay the availability of certain employment rights such as eligibility under company wage continuation programs. It can mean an inability to resist a layoff due to reduction in force or a delay in the ability to take promotional examinations or bid on better jobs. The

---

[17] *See, e.g., Kornblum v. Newark Unified School District,* 37 Cal. App.3d 623, 112 Cal.Rptr. 457 (1974) (mandatory leave three months prior to delivery, no return before three months after childbirth or the following academic year, which ever comes first).

[18] *See, e.g.,* Liberty Mutual's current leave policy, App. 33.

[19] More than one in four women surveyed lose all employment benefits on leave. *Id.*

employer in *Satty v. Nashville Gas Company* ..... F.2d ....., 10 Emp. Prac. Dec. ¶10,359 (6th Cir. August 8, 1975), for example, permitted women to return to work six weeks after childbirth. Women who returned from leave were placed in temporary positions until a permanent position became available which was not bid on by a permanent employee. *Satty v. Nashville Gas Co., supra,* 10 Emp. Prac. Dec. ¶10,359. Unlike employees who were disabled, women on maternity leave lost accumulated seniority for job bidding purposes although they retained vacation and pension seniority. The plaintiff, Nora Satty, returned to work six weeks after childbirth, was placed in a temporary position with the company and proceeded to bid on three successive permanent job openings. In each case, however, a permanent employee with job seniority was awarded the position. Had she retained her job bidding seniority while on leave, Nora Satty would have been the senior bidder for each of the positions. Instead, Nora Satty's temporary job was ended and she was forced to apply for unemployment insurance *Id.* See also, *Zichy v. City of Philadelphia,* 392 F.Supp. 338 (E. D. Pa. 1975) (promotional examinations).

And, of course, leave periods mean the loss of wages for the pregnant employee just at the time when she, like other disabled employees, may need them most. This need may be exacerbated if her company health insurance policy, like many employer policies, does not cover the cost of maternity hospitalization at the same rate as other hospitalization. See, e.g., *Satty v. Nashville Gas Co., supra,* 10 Emp.

Prac. Dec. ¶10,359. As for other employees whose wages may be essential to their family's well-being,[20] the loss of income can mean difficulty in meeting incoming bills and credit repayment schedules, a circumstance which could compromise her ability to borrow in the future.[21] And, of course, there is a new child in the family and extra expenses are incurred for this reason as well.

The practical difference a sick leave, as contrasted with a maternity leave, can make to an employee is summed up in *Zichy v. City of Philadelphia, supra,* 392 F.Supp. 338, 340-341:

> When taking sick leave, a city employee continues to earn his or her normal salary and to accrue seniority, does not lose the privilege of taking promotional examinations for the time out, has the time out credited for service and

[20]In 1970, 3,726,000 babies were born. Of these, 398,700 were born to women who were single, divorced or widowed. U.S. Bureau of the Census, *Statistical Abstract of the United States, 1974,* p. 56, Table 76 (1974). Another 490,000 to 551,000 babies were born to married women heavily dependent on their own earnings. (This latter figure is computed on the assumption that the 3.9-4.4 million married women heavily dependent on their own earnings have a share in legitimate births equal to the proportion they are of all married women of childbearing age.) U.S. Bureau of the Census, "Money Income in 1973 of Families and Persons in the United States," *Current Population Reports,* Series P-60, No. 97 (1975), p. 87, Table 39; See also, U.S. Department of Health, Education and Welfare, "Wife's Earnings as a Source of Family Income," Social Security Administration, Research and Statistics Note No. 10 (1974), p. 4, 10-12.

[21]Since women make on the average 60.8 percent of what men make, according to figures recently released by the Census Bureau (San Francisco Chronicle (Mon., Sept. 1, 1975), p. 6, col. 1), an interruption in earnings can create a particularly acute financial strain for families heavily dependent upon the woman worker for its income, because such families find it difficult to accumulate liquid assets to tide them over during periods when income ceases or diminishes significantly.

> will receive the same raises as other employees in his or her classification who were not on sick leave. In addition, the employee continues to accumulate sick leave while on leave, will suffer no adverse effect on promotions, will resume the same position held prior to the commencement of such sick leave upon return, and will have no change in anniversary date of employment, pension plan, vacation time, and other fringe benefits as a result of using the sick leave.

The less tangible effects of pregnancy policies on the woman worker's psyche, motivation and commitments to the employer are incalculable. Employers have always understood the value of fringes:

> It must be remembered that we are not dealing with a mere gratuity, to be bestowed upon such objects of the donor's bounty as the donor or his trustee may select. On the contrary, the trust indenture represents a hard-headed business device to attract and hold employees.

D. Allen, *Fringe Benefits: Wages or Social Obligation?, supra,* p. 244, quoted from *Russell v. Princeton Laboratories,* 66 LRRM 2350 (1967). At some level, the treatment of pregnant women must be understood as an assessment by employers of the value of their women workers. The message, in too many instances, is as more freely articulated in earlier times: Women are marginal workers who are not worth the investment. Arbitrary pregnancy rules contribute to making this a self-fulfilling prophecy.

Finally, even the small percentage of women workers who never become pregnant do not escape the

effects of the employer's concern about pregnancy. Young women applying for jobs find they are asked about family plans and what method of birth control they use.[22] Based on the possibility that they might become pregnant, they are not offered certain jobs or are placed in the low paid, dead-end jobs which characterize women's place in the labor force today. See, generally, U.S. Dept's. of Labor and Health, Education, and Welfare, *Manpower Report to the President* (1975), *supra,* pp. 60, 61, and, *Report of the Twentieth Century Fund Task Force on Women and Employment: Exploitation from 9 to 5* (1975), p. 60. Cf. *Cheatwood v. South Central Bell Telephone & Telegraph Company,* 303 F.Supp. 754, 759-60 (M. D. Ala. 1969) (all women denied job of commercial representative, in part because the employer felt that if they became pregnant they could not perform job). Jobs which are part of a promotional ladder in the company are denied them because it is assumed they lack long term job commitment, and the promotions themselves are not forthcoming for the same reason.

If ever the assumptions of marginal workforce attachment of women were justified, they are no longer. Career commitment and occupational aspirations are on the rise among women. The labor force participation of women, particularly married women

---

[22]Wetzel, in her complaint filed with the Pennsylvania Human Relations Commission, alleged that she was subjected to inquiries about anticipated marriage and family size as a condition of hire. Ross, in her complaint filed with the Equal Employment Opportunity Commission, alleged she was questioned regarding marital situation and birth control. See, respondent Wetzel's brief to the 3d Circuit, p. 6.

and women with young children, has undergone a steady and dramatic change in recent years. Mothers with school-age children are just as likely to work today as were unmarried women in 1950. U.S. Dep'ts. of Labor and Health, Education and Welfare, *Manpower Report to the President* (1975), *supra,* pp. 57-58. The most dramatic increase in participation has occurred among women with pre-school aged children, one-third of whom are now in the workforce. H. Hayghe, "Labor Force Activity of Married Women," *Monthly Labor Review,* Vol. 96, No. 4 (1973), p. 31. Women, including new mothers, are in the workforce to stay.[23]

---

[23]Contributing to workforce participation are the lower birth-rate, later marriage, and rising divorce and separation rates. U.S. Dep'ts. of Labor and Health, Education and Welfare, *Manpower Report of the President,* (1975) pp. 56-57.

> Over the past decade, female-headed families with children have grown almost ten times as fast as two-parent families. . . . Moreover, it appears that this shift in family structure has accelerated in the last few years; there were one million more mothers heading families in 1973 than in 1970, an increase which exceeds the new growth over the entire previous decade. . . .

I. Sawhill, "Discrimination and Poverty Among Women Who Head Families", *Signs: Journal of Women in Culture and Society* (Dec. 1975) (forthcoming). These reasons for greater workforce participation of women confirm the fact that many women work because they must.

On three occasions last term, this Court has recognized the significant change in the workforce participation of women and the harm done to them by sex-role stereotypes based on outmoded notions about life patterns and workforce commitment. *See Stanton v. Stanton,* ___ U.S. ___, 95 S.Ct. 1373, 1378 (April 15, 1975); *Weinberger v. Wiesenfeld,* ___ U.S. ___, 95 S.Ct. 1225, 1231 n. 11 (March 19, 1975); *Taylor v. Louisiana,* ___ U.S. ___, 95 S.Ct. 692, 700 n. 17 (Jan. 21, 1975).

C. Employer Pregnancy Policies Penalize And Burden Working Women's Procreative Choice.

Amici have documented in Section I-B above the sweeping impact of employer pregnancy practices upon women's status in the workforce. Because they jeopardize women's immediate economic position and long-term workforce status, these pregnancy rules have an additional and equally invidious effect: they burden women's procreative choice.

In a series of recent decisions, having their origin in *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942), this Court has declared that the decision whether to bear or beget a child is "so rooted [in our traditions] . . . as to be ranked as fundamental." *Snyder v. Massachusetts,* 291 U.S. 97 (1934). See *Cleveland Board of Education v. La Fleur,* 414 U.S. 632, 639 (1974); *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 35 n. 76 (1973); *Roe v. Wade,* 410 U.S. 113, 152-153 (1973); *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972); *Griswold v. Connecticut,* 381 U.S. 479 (1964). Of particular relevance to this case is the Court's recognition in *La Fleur* that an employer's rules respecting pregnancy can "penalize" or "constitute a heavy burden on the exercise of these protected freedoms." *Cleveland Board of Education v. La Fleur, supra,* 414 U.S. at 639.

The galaxy of special restrictions and exclusions affecting pregnancy—of which the compulsory maternity rules invalidated in *La Fleur* are but one component—do not directly deprive a woman of her right

to decide to bear a child. They do, however, have a substantial impact upon that right, operating in some cases to foreclose the choice of childbearing altogether, or more generally, to condition that choice upon the short and long-term sacrifice of employment security and opportunity and the concomitant suffering of economic hardship against which all other temporarily disabled workers are protected.

The dire consequences for working women of discriminatory pregnancy rules are illustrated in the records of related cases challenging the employer pregnancy rules. *See, e.g., Newmon v. Delta Airlines, Inc.,* 475 F.2d 768 (5th Cir. 1973) (plaintiff lost her employee benefits plus the right to reinstatement); *Holthaus v. Compton,* 514 F.2d 641 (8th Cir. 1975) (plaintiff lost her job because of one month's absence due to miscarriage); *Gilbert v. General Electric,* 375 F.Supp. 367 (E.D. Va. 1974), aff'd, ... F.2d ..... (a G.E. employee who worked until five weeks before childbirth was impoverished by virtue of the denial of disability benefits and had to resort to Welfare Aid after having her utilities cut off).

Though the lower court decisions holding Title VII applicable to pregnancy issues have focused primarily on the sex-discriminatory aspects of differential or exclusionary treatment of pregnancy, several of these decisions have recognized—as did this Court in *La Fleur*—the concomitant infringement upon the fundamental right to procreate. In *Hutchison v. Lake Oswego School District,* the district court ruled that "[t]he classification [excluding pregnancy from accrued sick leave] also discriminates because it requires plaintiff to choose between employment and pregnancy." 374 F.Supp. 1056, 1063 (D. Ore. 1974), aff'd, ... F.2d ....., 10 Emp. Prac. Dec. ¶10,325 (9th Cir. July 21, 1975). See also *Buckley v. Coyle Public School System,* 476 F.2d 92, 96 (10th Cir. 1973) (automatic termination of employment after six months); *Robinson v. Rand,* 340 F.Supp. 37, 38 (D. Colo. 1972) (automatic discharge because of pregnancy). In *Gilbert v. General Electric Company, supra,* the district court rejected the argument that the legal accessibility of abortion can be deemed to mitigate the impact of excluding pregnancy from disability benefits:

> Indeed, under G.E.'s policy the consequence of a female employee exercising her innate right to bear a child may well result in economic disaster, as in the case of at least one of the witnesses who appeared before this court . . . . [W]omen are required to undergo the economic hardship of the disability which arises from their participation in the procreative experience . . . . While it is true that women may, under certain conditions, resort to an abortion . . . it cannot be reasonably argued that Congress in its enactment of Title VII ever intended that an intended beneficiary of that Act forego a fundamental right, such as a woman's right to bear children, as a condition precedent to the enjoyment of the benefits of employment free of discrimination. 375 F.Supp. at 381.

See also *Griswold v. Connecticut, supra,* 381 U.S. at 479 (Goldberg, J., concurring); *Andrews v. Drew Municipal Separate School District,* 507 F.2d 611, 615 (5th Cir. 1975).

Thus, employer pregnancy rules not only affect the work status of women in pervasive and permanent ways, but also impose on working women the Hobbesian choice between employment and equal employment opportunity on the one hand and the exercise of their right to procreate on the other. As such, these rules not only discriminate against women, but also penalize them for exercising "one of the basic civil rights of [wo]man" recognized as "fundamental" in the historic teachings of this Court. See *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975).

II. THE HIGHER COST OF DISABILITY COVERAGE FOR WOMEN IS DUE TO THEIR CONCENTRATION IN LOW PAID JOBS RATHER THAN THEIR GENDER, AND THE COST OF ADDING CHILDBIRTH DISABILITIES TO INCOME PROTECTION COVERAGE IS MODERATE.

The employers who are petitioners and amici in this case repeatedly assert that the exclusion of childbirth disabilities from wage continuation plans does not discriminate against women because women as a class already receive a disproportionate advantage under existing disability plans,[24] and in addition that

[24]If women receive "preferential treatment" under employer sickness and accident plans, minority workers are even more "favored", since the disparities in disability rates are far greater between whites and minorities than they are between men and women. In 1968, minority persons lost 8.1 days from work compared to 5.1 for Caucasian workers; males lost 5.2 days, compared to 5.9 for females. United States Department of Health, Education and Welfare, Public Health Service, *Time Lost from Work Among the Currently Employed Population, United States: 1968*, Vital and Health Statistics, Series 10, No. 71, (1972), Table 7.

the cost of adding childbirth disabilities would further skew such plans in favor of women.[25]

Such contentions omit the reality that income protection plans are but one of several ways in which employers compensate disability days, under some of which men typically cost the company more than women. They are also a cynical confounding of cause with effect to the detriment of their women employees. Low income workers, not women, have a higher incidence of disability. The disproportionate concentration of women in low paying jobs is a major cause of women's apparently higher incidence rates. Moreover, the addition of childbirth disability coverage under such plans, like the addition of any other disability risk category, will cost money, but the cost is simply not of the magnitude that employers participating in this case contend.

[25]As discussed in detail in the text, *infra*, women are not "favored" under such plans. But even if women as a group had, under some wage continuation arrangements somewhat more disability days than men, any individual woman may have no disabilities, or fewer disability days than the average man. Title VII prohibits the unequal treatment of individuals because of characteristics attributed to the sex or race to which they belong. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Rosen v. Public Service Electric & Gas Co.*, 477 F.2d 90, (3d Cir. 1973); *Rosenfeld v. Southern Pacific Company*, 444 F.2d 1219 (9th Cir. 1971); *Bartmess v. Drewrys USA, Inc.*, 444 F.2d 1186, (7th Cir. 1971); *Manhart v. City of Los Angeles*, 387 F.Supp. 980, (C.D. Cal. 1975). To offer the group characteristic as a justification for denying benefits to individual women is therefore contrary to the fundamental principle of Title VII. Assertion of group disability characteristics cannot disguise the effect of the exclusion of pregnancy and childbirth disabilities from sickness and accident plans: each male employee is covered for all disabilities which he may suffer; every woman employee is not.

A. Salary Level Rather Than The Sex Of The Individual Determines The Disability Incidence Rate.

The best indicator of total employer cost for employee absence from work—a measure which includes days missed due to pregnancy-related disability[26]—is days missed from work per year. Even without factoring in individual earnings, family income, or age, all of which have a significant impact on work loss days,[27] the sex differences in work loss due to illness and disability are minor indeed. In some years, men lost more days from work than did women. In others, women's days lost have slightly exceeded men's.[28] In each year the difference in days missed

[26]Citizen's Advisory Council on the Status of Women, *Women in 1971* (1972), p. 55.

[27]See, e.g., U.S. Bureau of the Census, *Persons with Work Disability: 1970* (Jan. 1973), Tables 6 (age, occupation), 9 (age, earnings), 10 (age, family income); U.S. Department of Health, Education and Welfare, Public Health Service, *Disability Days: 1968*, Vital & Health Statistics Series 10, No. 67 (1972), Tables E and F (family income, age).

[28]In 1965-1966, 1964-1965, 1963-1964, men lost more days than women. U.S. Department of Health, Education & Welfare, *Time Lost from Work Among Currently Employed Population, United States: 1968*, Vital & Health Statistics, Series 10, No. 71 (1972), Table A. (Hereinafter "Time Lost from Work"). In 1968, men lost 5.2 days compared to 5.9 for women, a difference of approximately 5 and one half *hours* per year. *Id.* In 1968-1969, men lost 5.1 days and women 5.5, a difference of approximately three *hours* per year. *Id.* In the 17 to 44 year old age group, women missed more days than men that year, but men lost more days than women in the 45-64 year old age group. U.S. Department of Health, Education & Welfare, Public Health Service, *Age Patterns in Medical Care, Illness, and Disability, United States, 1968-1969* (1972), Table 17. The most recent available national statistics, those for 1972, indicate that men missed 4.9 days and women 5.5, a difference of less than five *hours* per year. U.S. Department of Health, Education, & Welfare, Public Health Service, *Current Estimates from the Health Interview Survey, United States—1972*, Vital & Health Statistics Series 10, No. 85, (1973), Table 16.

between men and women was less than a single day. Therefore, in the "total universe" of employer income protection provisions, a universe which includes sick leave, sickness and accident plans, long range disability plans and worker's compensation for occupational injury,[29] the cost to the employer for work days lost can be expected to be approximately the same for the average woman as for the average man.[30]

Moreover, within the category of work disabilities covered by sickness and accident plans, wage or salary

[29]U.S. Women's Bureau, "Facts About Women's Absenteeism and Labor Turnover" (1969).

[30]If income and other factors are not taken into account, women on the average have a higher incidence of acute conditions, whereas men have a higher incidence of chronic illness. *See, e.g.*, Dept. of Health, Education and Welfare, *Acute Conditions, Incidence and Associated Disability—U.S. July 1972-June 1973*, Vital and Health Statistics Series 10, No. 98 (1974), Table 10; U.S. Department of Health, Education and Welfare, *Current Estimates from the Health Interview Survey—1972*, Vital and Health Statistics Series 10, No. 98 (1974), Table 9 (hereinafter *"Current Estimates"); Current Estimates—1971, supra* (1973), Table 6, 9. Men have a higher rate of injury, both occupational and nonoccupational. *Current Estimates—1972, supra*, Table 6, 10, 11, 12. Given these tendencies. women workers are likely to account for more sick leave and short term disability days, whereas men constitute a significantly heavier drain on long term plans and workers compensation. See Dep't. of Industrial Relations, Division of Labor Statistics and Research, *California Work Injuries 1973* (Dec. 1974), Tables 18 and 21; Department of Human Resources Development, *Female & Minority Labor Force Estimates*, Report 400F (Oct. 22, 1973); "Frequency and Duration of Disability Among Company Employees in 1971-72," *Metropolitan Life Statistical Bulletin* Vol. 55 (Oct. 1974); U.S. Dep't. of Commerce, Bureau of the Census, *Persons With Work Disability: 1970* (Jan. 1973), Table 9, see Appendix. U.S. Dep't. of Labor, "Facts About Women's Absenteeism and Labor Turnover" (August 1969), p. 1. Each of these measurements of acute and chronic illness and injury forms a part of the relevant statistic which is days lost from work due to disability.

level, rather than sex, is the primary predictor of work loss due to disability. United States Census data shows that disability rates decline as wages rise, and *that the disability rates for men and women are almost the same, although men in every income category have a slightly higher disability rate.* U.S. Census Bureau, *Persons with Work Disability: 1970* (1973), Table 9, described in the Appendix to this brief.[31]

If, then, companies like Liberty Mutual and American Telephone and Telegraph assert that their women workers have a significantly higher disability rate than their male workers, one would suspect that their women workers are highly concentrated in low paying jobs. And, indeed, in the case of these two companies, the prediction is strikingly confirmed.

Liberty Mutual's employees are divided into two broad categories, technical and clerical. App., p. 31. The clerical employees provide the secretarial staff support for the technical employees, App., p. 31, and are predominantly female.[32] At the entry level, the technical employees are in two jobs, claims adjuster

---

[31]See also, S. Riesenfeld, *Temporary Disability Insurance,* Hawaii Legislative Reference Bureau Report No. 1 (1969), pp. 86, 87, Table 29. Family, as compared to individual, income is a less reliable measure of disability rates because it typically includes high male and low female incomes, but it also generally confirms the inverse relationship of income and disability. Department of Health, Education and Welfare, *Time Lost From Work Among Currently Employed Population, U.S.: 1968, supra,* Table B.

[32]Although the record does not show how many of the clerical employees are women, there is no reason to believe that the gender composition of the secretaries at Liberty Mutual differs dramatically from the norm.

and claims representative, the basic functions of which are "the application of the necessary technical skills to investigate and bring about the proper disposition of claims against the company." *Wetzel v. Liberty Mutual Ins. Co.,* 508 F.2d 239, 243 (3d Cir. 1975). The educational requirements for the two jobs are the same, a college degree; neither job requires previous experience. *Wetzel v. Liberty Mutual Insurance Company,* 372 F.Supp. 1146, 1150 (W.D. Pa. 1974). Between 1965 and 1970, Liberty Mutual hired more than 2000 claims adjusters, all of whom were men. Between 1965 and 1972, the company hired 2,329 claims representatives, 98.84% of whom were women. *Id.* at 1151. Claims adjusters were paid approximately $2500 more per year than claims representatives. *Id.,* at 1151. The only supervisory positions open to the female claims representatives involved the immediate supervision of claims representatives. Claims adjusters could be promoted to those positions and to numerous other supervisory and management positions in the company. *Wetzel v. Liberty Mutual Insurance* Company, *supra,* 508 F.2d at 258. In short, Liberty Mutual's women employees were exclusively relegated to the low-paid, dead-end jobs, whereas men were in almost all of the higher paid entry level and management jobs.

American Telephone and Telegraph's Bell system companies employ more women than any other company in the United States. In 1971, 400,000 women worked for AT&T's operating companies and constituted more than half their employees. 118 *Cong. Rec.*

4507, 4510 (92d Cong., 2d Sess. Feb. 17, 1972).[33] In that year, almost every single job in the operating companies was sex segregated. *Id.*, at 4510, Table 4. Every major low paying job was a "female" job and every better paying job was without exception[34] a "male" job. *Id.*, at 4511. Forty percent of the Bell system's women employees (and 28 percent of all its employees) were telephone operators. The operator job was (and remains) the lowest paying and least desirable major job in the system. *Id.*, at 4508. A 1970 report by the Southwestern Research Institute describes the operator job as follows:

> "[Operators are quick to describe] the noxious demands of work that is too highly structured, their loss of personal identity, their lack of freedom to rely on their own judgment, their difficulty in becoming part of a cohesive social group, and the absence of any reasonable hope for future advancement. . . . They are necessary parts of a system designed by geniuses for execution by idiots."

Id., at 4508. Promotional ladders, too, were sex segregated in the Bell operating companies. Almost 94 per-

[33]The information on AT&T's employment practices is contained in an Equal Employment Opportunity Commission study of Bell System employment entitled *"A Unique Competence": A Study of Equal Employment Opportunity in the Bell System* (1972) submitted in a proceeding before the Federal Communications Commission. The report was reprinted in the Congressional Record at the request of the Hon. Shirley Chisholm, member of the House of Representatives from New York.

[34]The *average* weekly wage of women with two to five years seniority in the Bell System in Fiscal 1970-1971 was $111.75. Brief Amicus Curiae of American Telephone and Telegraph Company, Appendix, p. 9a (hereinafter, "AT&T Brief").

cent of female managers were at the first (bottom) level of management. *Id.*, at 4511-12; virtually none reached the third level. Forty-five percent of the male managers were at level two or above.[35] *Id.*, at 4511-4512.

Under the circumstances, the fact that "women received compensation for 63.45 percent of the total benefits days though representing only 48.29 percent of employees eligible for benefits" in 1971-1972 (Petitioner's Brief, p. 22, no. 43, AT&T Brief, p. 54) is no surprise. Rather than constituting proof of the costly "frailty" of women, it is testimony to the deeply entrenched workforce segregation of and discrimination against women in the Bell System Companies. As in *Frontiero v. Richardson*, 411 U.S. 677, 689 n. 22 (1973), it can truly be said that AT&T, Liberty Mutual and employers like them who excuse their refusal to cover pregnancy and childbirth disabilities on the ground that women already receive a larger share of the benefits have "seized upon a group—women—who have historically suffered discrimination in employment, and rely upon the effects of this past discrimination as a justification for heaping on additional economic disadvantages."

[35]Under the circumstances, it is no surprise that the one category in which men's disability exceeds women's in the Bell companies is "diseases of circulatory system" which includes heart attacks and other cardiac problems. AT&T Brief, Appendix, pp. 13a, 14a, Tables 2, 3. Women never get high enough in the Bell system to fall prey to the special tensions and pressures that give rise to heart conditions.

B. The Cost Of Adding Childbirth Disabilities To Liberty Mutual's Income Protection Plan Is Moderate.

The addition of childbirth disability coverage under employer income protection plans, like the addition of any other previously excluded risk category, will cost money, but the cost is simply not of the magnitude that that Liberty Mutual contends. As discussed above, the sex difference in work lost due to illness and disability nationally—*including* workloss due to pregnancy-related disabilities—is very slight—less than a single day. See footnotes 28 and 30, *supra*. The federal civil service experience with sick leave, which is given for pregnancy- and childbirth-related disability, substantially confirms the national figures. President's Commission on the Status of Women, *Report of the Committee on Federal Employment,* p. 31. The U.S. Public Health Service, in a tabulation performed for the Citizens Advisory Council on the Status of Women, calculated that time lost from work because of childbirth *and* disorders of pregnancy averaged one hour and 20 minutes per woman in the fiscal year 1966-1967. Citizens Advisory Council on the Status of Women, *Women in 1971, supra,* p. 55.

The moderate cost of including childbirth disabilities under sick leave policies is confirmed in a study of the costs to employers of implementing the EEOC guidelines on pregnancy-related disability made by the Federal Reserve Bank of Boston. The Bank concludes that "the results suggest that the costs would have negligible impact on overall labor costs." C. Greenwald, "Maternity Leave Policy," *New England Economic Review* (Federal Reserve Bank of Boston, Jan.-Feb., 1973), p. 18. The Bank, using its own staff for the study, found that treating pregnancy disability in a manner identical to other illnesses would have had the same effect as adding between $.004 and $.01 to the hourly wage of its employees,[36] representing an increase to its labor costs of between one-tenth and two-tenths of one percent.[37]

The Federal Reserve Bank study confirms the general accuracy of respondent's calculation that the cost of adding childbirth disabilities to Liberty Mutual's income protection plan would be about twenty-five cents per week per employee. See Respondent Wetzel's brief to the Third Circuit, pp. 42-43.[38]

Liberty Mutual's estimates of dramatic increases in the cost of coverage are based on a hodge-podge of inflated and misleading statistics. The AT&T cost estimates which it quotes are based on a *5½ month average disability* duration, a duration which even AT&T now rejects as excessive. AT&T Brief, Appendix, p. 6a. The California estimate of 33 to 36% in *Geduldig v. Aiello,* 417 U.S. 484 (1974) is patently incorrect, since it was the figure given in the trial court which

---

[36]The lower end of the range was based on the assumption of absences averaging ten weeks, the upper end on absences averaging 14 to 16 weeks. *Id.*, at 17, Table 3.

[37]A one-time increase of wage levels by a half cent per hour can be put into further perspective by considering that the annual increase in per hour earnings levels in the United States private sector has been at or above 18 cents per hour in each of the last five years. U.S. Dep't. of Labor, *Employment and Earnings* (June 1975), p. 83, Table C-1.

[38]This amount of increased cost is based on an average childbirth-disability duration of eight weeks.

included complications of pregnancy. Moreover, it too was based on an inflated estimate of the duration of childbirth disabilities. Brief of Appellees in *Aiello,* p. 84 and p. 85, n. 115. Finally, the "experiences" described for the New Jersey, Hawaii and Rhode Island state disability plans are highly misleading. The so-called New Jersey "experience" is based on the experience under one of three separate funds, the "disability during unemployment" fund, which accounts for only 10% of total New Jersey disability benefits but 74% of the disabilities due to childbirth. Supplemental Brief of Appellees in *Aiello,* pp. 3-6. The Hawaii "experience" is in fact only the experience of one insurance company, Equitable Life Assurance Society, which accounts for a minute percentage of the disability coverage in Hawaii. At least 90 percent of the employees in Hawaii are insured by six insurers, only one of which raised its rates *at all. Id.,* pp. 7-9. Rhode Island's unfortunate "experience" with pregnancy was due to its failure to apply to disabilities arising from it the same standards and duration controls that it maintained for other disabilities. See E. Koontz, "Childbirth and Child Rearing Leave: Job-Related Benefits," 17 N.Y.L. Forum 480, 484-85 (1971).

In any event, it was not the cost of covering childbirth disabilities that motivated Liberty Mutual to exclude them from its income protection plan. The company did not even raise the cost issue in the trial court. *Wetzel v. Liberty Mutual Insurance Co., supra,* 372 F.Supp. 1146. When its personnel manager was asked why its plan excludes childbirth disabilities, he

replied, "On advice of counsel." App. p. 43. Until 1967, Liberty Mutual fired pregnant employees and even today excludes not only childbirth disabilities, but any "disability due to pregnancy or any cause related to pregnancy." Brief of Petitioner, App. A., p. A-3. One can only suspect that the reason why Liberty Mutual excludes all pregnancy-related disabilities from its income protection plan is not cost but rather because of its unwillingness to accord its women employees full and equal status in its workforce.

III. TITLE VII PROHIBITS DISCRIMINATION AGAINST WOMEN UNDER EMPLOYER PREGNANCY POLICIES

Liberty Mutual's defense of its exclusion of pregnancy disabilities from its income protection plan centers upon its contention that *Geduldig v. Aiello,* 417 U.S. 484 (1974), a case decided under the Fourteenth Amendment to the Constitution, resolves the issue whether pregnancy discrimination is sex discrimination under Title VII. Liberty Mutual relies on a footnote to *Aiello,* in which this Court states that the exclusion of childbirth disabilities from coverage under California's state disability insurance program is not sex discrimination under the Fourteenth Amendment "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other." 417 U.S. at 496-497, n. 20.

If constitutional and statutory construction were a matter of abstract symmetry, one constitutional inter-

pretation resolving all similar questions of statutory construction, perhaps Liberty Mutual would prevail. Rather, each legislative enactment, as well as each constitutional provision, is to be interpreted in light of its transcendant purposes and specific provisions. In passing legislation, Congress is not bound by the minima required by the Constitution. Compare, *e.g.*, *Lassiter v. Northampton County Bd. of Election,* 360 U.S. 45 (1959) (upholding the constitutionality of a state voter literacy test) with *Katzenbach v. Morgan,* 384 U.S. 641 (1966) (upholding a provision of the Voting Rights Act of 1965 which prohibited certain state voter literacy requirements). See also, *Oregon v. Mitchell,* 400 U.S. 112, 141, 248-249, 286-287 (1970); *Espinoza v. Farah Manufacturing Co.,* 414 U.S. 86, 91 (1973). Accordingly, the Fourteenth Amendment neither fixes the scope of Title VII's prohibition of sex discrimination nor informs its interpretation.

The question, therefore, is what conduct Congress intended to prohibit when it enacted Title VII. Viewing employment discrimination as a complex and pervasive phenomenon, manifested in systems and effects as well as isolated acts of ill-will, Congress intended to protect workers from all forms of disparate treatment because of race, color, religion, sex or national origin. See S. Rep. No. 92-415, 92d Cong., 1st Sess. 5 (1971.)

The language of the Act's non-discrimination provisions reveals the breadth of this purpose. Not only does the Act prohibit "discrimination against any individual with respect to his compensation, terms, conditions, or privileges of employment," but it also forbids classification of employees *"in any way* which would deprive *or tend to deprive* any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex or national origin." Section 703(a)(1)(2), 42 U.S.C. § 2000e-2(a)(1)(2) (emphasis added).

This Court, considering the intent of the Act for the first time, described its scope in terms which gave full play to the Congressional purpose:

> The Act proscribes not only overt discrimination but also practices which are fair in form, but discriminatory in operation. . . .
>
> Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.

Griggs v. Duke Power Co., 401 U.S. 424, 431-432 (1971). See also *Albemarle Paper Co. v. Moody,* ..... U.S. ....., 95 S. Ct. 2362, 2374 (1975); *Espinoza v. Farah Manufacturing Co., supra,* 414 U.S. 86, 92. The elimination of "built-in headwinds" to the realization of full employment opportunities was declared by *Griggs* to be a goal of Title VII:

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Griggs, 401 U.S. at 431.

Applying this general intent to the Act's specific prohibition of sex discrimination, the Seventh Circuit, noting that Congress had not confined the scope of the Act to discriminations based "solely" on sex,[39] stated:

> In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past. The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex . . . or through the unequal application of a seemingly neutral company policy. . . .

Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971). See also *Rosen v. Public Service Electric and Gas Co.*, 477 F.2d 90, 95 (3d Cir. 1973).

In the absence of any specific indication of Congressional intent on the pregnancy issue, it is the language and dominant purpose of Title VII which must directly determine the validity of Liberty Mutual's policy of denying disability benefits to women employees unable to work because of pregnancy-related

[39] Amendments in the House and Senate intended to narrow the scope of Title VII's prohibitions by restricting the Act to discrimination "solely" on the basis of race, sex, national origin or religion were defeated. 110 *Cong. Rec.* 2728 (88th Cong., 2d Sess., Feb. 10, 1964). Compare *Reed v. Reed*, 404 U.S. 71, 75-76 (1971), which states that only discrimination based "solely" on sex is prohibited by the Fourteenth Amendment.

disability. See *Carter v. Panama Canal Company*, 463 F.2d 1289, 1300 (D.C. Cir. 1972). It is *amici's* contention that to exclude discriminatory pregnancy rules and practices from coverage under Title VII would be inconsistent with the language and purposes of Title VII.

Pregnancy disabilities are "ineluctably sex-linked," the result of a physical structure and biological potential which, more than any other characteristic, defines a person as female. Unfair pregnancy rules have almost always been based on the employer's stereotypes about a pregnant woman's future work commitment and abilities, rather than on the physical realities and job-related requirements of that condition. (Section I-A, *supra.*) Today, such rules affect the wages, job opportunities, and promotions of working women, the substantial majority of whom become pregnant at some point in their working lives. (Section I-B, *supra.)*

As the Fourth Circuit states in *Gilbert v. General Electric*, ... F.2d ..... 10 Emp. Prac. Dec. ¶10,269 (4th Cir. 1975): "Any discrimination, such as that here, which is 'inextricably sex-linked' in consequences and result, is violative of the Act." Every Circuit which has considered the issue since *Geduldig v. Aiello* has so concluded. *Communication Workers of America v. American Telephone and Telegraph Company*, 513 F.2d 1024 (2d Cir. 1975); *Wetzel v. Liberty Mutual Insurance Company, supra*, 511 F.2d 199 (3d Cir. 1975); *Gilbert v. General Electric Co., supra*, ... F.2d ....., 10 Emp. Prac. Dec. ¶10,269 (4th Cir. June 27,

1975) *Holthaus v. Compton & Sons,* 514 F.2d 651 (8th Cir. 1975); *Hutchison v. Lake Oswego School District,* ..... F.2d ....., 10 Emp. Prac. Dec. ¶10,325 (9th Cir. July 21, 1975).

Significantly, the Equal Employment Opportunity Commission ("EEOC"), the agency entrusted by Congress with interpreting and enforcing Title VII, has also concluded that pregnancy discrimination is prohibited by the Act. In its Sex Discrimination Guidelines, the EEOC states, *inter alia,* that pregnancy disabilities must be treated for all employment related purposes like other disabilities. 29 C.F.R. §1604.10.[40] The EEOC Guidelines are entitled to great deference, *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-434 (1971); *Albemarle Paper Co. v. Moody,* ..... U.S. ..... (1975), 95 S. Ct. 2362, 2378, unless "application of the guideline would be inconsistent with an obvious Congressional intent not to reach the employment practice in question"; *Espinoza v. Farah Manufacturing Co., Inc.,* 414 U.S. 86, 94 (1973).

[40]Section 1604.10(b) provides:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

Nothing in the Congressional history, compelling or otherwise suggests that the EEOC's interpretation is incorrect.[41] Indeed, in light of the language as well as the general intent of the Act, the Guidelines are, as the Fourth Circuit Court of Appeals concluded in *Gilbert v. General Electric,* ..... F.2d ....., 10 E.P.D. ¶10,269 n. 12 (4th Cir., June 27, 1975), "merely expressive of what is the obvious meaning and purpose of the Act."

The correctness of the EEOC's interpretation is evident not only from the intent and scope of the Act itself but also from Congressional and governmental agency treatment of pregnancy- and childbirth-related disabilities under other Federal legislation both prior to and after the EEOC issued its pregnancy guide-

[41]The fact that the 1972 issuance of the pregnancy guidelines express the EEOC's evolving perception of the discriminatory effects of the special treatment of pregnancy on equal employment opportunity can hardly be held to invalidate the guideline. This evolutionary process was not limited to sex discrimination nor to the EEOC. The Report of the Senate Committee on Labor and Public Welfare recommending passage of certain amendments to strengthen Title VII enforcement states:

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization . . . Experience has shown this view to be false.
>
> Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of systems and effects rather than simply intentional wrongs. . . .
>
> In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful. (S. Rep. No. 92-415, 92d Cong., 1st Sess. 5 (1971).)

See also H.R. Rep. 92-238, 92d Cong. 2d Sess. 8 (1971).

lines in 1972. The Railroad Unemployment Insurance Act, amended in 1946 to include temporary disability coverage, explicitly includes within its definition of "sick day," a day in which an employee cannot work because of pregnancy, miscarriage, or the birth of a child. 45 U.S.C. §351(k)(2).

Moreover, the United States Civil Service Commission has always interpreted the statute entitling federal employees to sick leave with pay to include childbirth- and pregnancy-related disabilities, even though the statute neither explicitly includes nor requires it. 5 U.S.C. §6307. See President's Commission on the Status of Women, *Report of the Committee on Federal Employment, supra,* p. 31.

Finally, Congress has indicated its approval of pregnancy regulations issued pursuant to a federal nondiscrimination law. Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, provides that "No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."

The implementing regulations, which took effect on July 21, 1975 after the receipt by H.E.W. of nearly 10,000 public comments, the signature of the President and considerable Congressional debate, include a provision the requirements of which are identical to those of the EEOC's pregnancy guideline. 45 C.F.R. Part 86, *Federal Register* Vol. 40, No. 108 (June 4, 1975), p. 24144. Section 86.57(c) provides:

> A recipient [of federal funds] shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.[42]

Thus, not only have the Government and Congress treated pregnancy related disabilities like other disabilities under paid sick leave programs, but also Congress has approved regulations which interpret the failure to do so as sex discrimination under federal law. Given these facts, there can be no doubt that the EEOC pregnancy guidelines properly and accurately interpret the requirements of Title VII.

---

[42]The regulations also provide that recipients must not discriminate against students on the basis of pregnancy or childbirth by excluding them from classes or programs, or by treating disabilities which arise therefrom differently than any other temporary disability with respect to medical or hospital benefits, services, plans or policies. 45 C.F.R. § 86.40.

CONCLUSION

For all of the foregoing reasons, as well as those urged by respondents, the decision of the Third Circuit Court of Appeals should be affirmed.

Dated, September 22, 1975.

Respectfully submitted,

WENDY WEBSTER WILLIAMS,
Equal Rights Advocates, Inc.,
433 Turk Street,
San Francisco, California 94102,
RHONDA COPELON,
Center for Constitutional Rights,
853 Broadway,
New York, New York 10003,
GLADYS KESSLER,
Women's Legal Defense Fund,
1424 - 16th Street, N.W.,
Washington, D.C. 20008,
SYLVIA ROBERTS,
General Counsel,
MARILYN HALL PATEL,
JUDITH LONNQUIST,
NOW Legal Defense and Education Fund,
9 West 57th Street,
New York, New York 10019,
Attorneys for Amici Curiae.

PETER HART WEINER,
Professor of Law,
University of San Francisco,
San Francisco, California,
Of Counsel.

Attorneys for Amici gratefully acknowledge the assistance of JoAnn Novoson, law clerk.

(Appendix Follows)

APPENDIX

APPENDIX

PRESENCE AND DURATION OF WORK DISABILITY FOR PERSONS 18 TO 64 YEARS OLD WITH WAGE OR SALARY INCOME IN 1969*

MEN

AGE 18-64	% With No Work Dis-Ability	Total % With Dis-Ability	Partial Disability							Com-Plete Dis-Ability
			Total	Less Than 6 Mos.	6-11 Mos.	1-2 Yrs.	3-4 Yrs.	5-9 Yrs.	10+ Yrs.	
TOTAL	91.09	8.91	7.73	.70	.52	1.13	1.10	1.27	3.02	1.18
1 - 999	84.73	15.27	10.74	.85	.85	1.87	1.54	1.57	4.07	4.53
$ 1000-1999	87.94	12.06	9.33	.82	.86	1.63	1.40	1.38	3.23	2.78
$ 2000-2999	87.74	12.26	9.86	.94	.98	1.68	1.39	1.43	3.43	2.41
$ 3000-3999	87.80	12.20	10.26	.96	.89	1.70	1.42	1.58	3.70	1.94
$ 4000-4999	88.40	11.60	10.10	.89	.75	1.56	1.44	1.71	3.74	1.50
$ 5000-6999	90.04	9.96	8.99	.84	.57	1.27	1.31	1.52	3.48	.98
$ 7000+	93.47	6.53	6.07	.55	.32	.78	.86	1.04	2.54	.46
7000-9999**	92.33	7.67	7.08	.64	.38	.92	1.01	1.23	2.90	.60
10,000-14,999**	94.07	5.93	5.55	.49	.27	.70	.77	.95	2.36	.38
15,000+**	94.41	5.59	5.27	.43	.26	.66	.75	.89	2.27	.32

*Calculated from: U.S. Dep't. of Commerce, Bureau of the Census, Persons with Work Disability: 1970 (Jan. 1973), Table 9. Presence and Duration of Work Disability for Persons 18 to 64 Years Old by Earnings in 1969, Type of Earnings, Race, Spanish Origin, Sex, and Age, 1970.

**Calculated from "Earnings" category, rather than "Wage and Salary" category, because "Wage and Salary" figures are available only up to the $7000+ bracket. "Earnings" includes both wage and salary and self-employment income.

APPENDIX

PRESENCE AND DURATION OF WORK DISABILITY FOR PERSONS 18 TO 64 YEARS OLD WITH WAGE OR SALARY INCOME IN 1969*

WOMEN

AGE 18-64	% With No Work Dis-Ability	Total % With Dis-Ability	Partial Disability						Com-Plete Dis-Ability
			Total	Less Than 6 Mos.	6-11 Mos.	1-2 Yrs.	3-4 Yrs.	5-9 Yrs.	10+ Yrs.	
TOTAL	93.79	6.21	4.82	.58	.44	.75	.74	.78	1.54	1.38
$ 1 - 999	91.08	8.92	6.15	.66	.57	1.05	.91	1.01	1.95	2.77
$ 1000-1999	92.49	7.51	5.65	.68	.58	.92	.87	.89	1.71	1.86
$ 2000-2999	93.25	6.75	5.33	.66	.55	.86	.79	.83	1.64	1.42
$ 3000-3999	94.27	5.73	4.73	.60	.44	.68	.73	.77	1.52	1.00
$ 4000-4999	95.18	4.82	4.09	.53	.33	.58	.63	.70	1.32	.72
$ 5000-6999	95.81	4.19	3.62	.46	.27	.50	.60	.59	1.20	.57
$ 7000+	96.06	3.94	3.44	.41	.24	.46	.54	.55	1.23	.50
$ 7000-9999**	96.10	3.90	3.41	.40	.23	.47	.55	.56	1.21	.49
10,000-14,999**	95.66	4.34	3.79	.43	.27	.51	.59	.57	1.41	.55
15,000+**	94.57	5.43	4.57	.56	.28	.52	.81	.78	1.62	.87

*Calculated from: U.S. Dep't. of Commerce, Bureau of the Census, Persons with Work Disability: 1970 (Jan. 1973), Table 9. Presence and Duration of Work Disability for Persons 18 to 64 Years Old by Earnings in 1969, Type of Earnings, Race, Spanish Origin, Sex, and Age, 1970.

**Calculated from "Earnings" category, rather than "Wage and Salary" category, because "Wage and Salary" figures are available only up to the $7000+ bracket. "Earnings" includes both wage and salary and self-employment income.

Supreme Court, U. S.
FILED
SEP 24 1975
MICHAEL RODAK, JR., CLERK

No. 74-1245

Supreme Court of the United States

October Term 1975

LIBERTY MUTUAL INSURANCE CO., INC.,
Petitioner,

v.

SANDRA WETZEL, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND INTERNATIONAL UNION UAW AS AMICI CURIAE

STEPHEN I. SCHLOSSBERG
1125 15th Street, N.W.
Washington, D.C. 20005

JOHN FILLION
8000 East Jefferson
Detroit, Michigan

Attorneys for UAW

J. ALBERT WOLL
ROBERT C. MAYER
736 Bowen Building
815 15th St., N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th St., N.W.
Washington, D.C. 20006

Attorneys for AFL-CIO

INDEX

Page

INTEREST OF THE AMICI CURIAE 1

ARGUMENT 2

I. Since Title VII Proscribes a Classification Such As the Pregnancy Exclusion in This Case Which, While Cast in Neutral Terms, Adversely Affects As Employees a Sub-Group Which Is Entirely Composed of One Gender Without a Showing of Business Necessity, *Geduldig* v. *Aiello*, 417 U.S. 848 (1974), Has No Relevance to This Case 4

II. The Exclusion of All Pregnancy-Related Disabilities From a Broad Income Protection Plan Relegates Affected Women and, Indirectly, Almost All Women of Child-Bearing Age to a Status of Less-Valued, Less-Protected Employees 12

III. Petitioner Has Made No Showing of Business Necessity Sufficient to Justify the Exclusion of Pregnancy From Its Disability Insurance Program 19

CONCLUSION 23

CITATIONS

CASES:

Albemarle Paper Co. v. *Moody*, 43 U.S.L.Wk. 4880 (June 25, 1975) 20

Cheatwood v. *South Central Bell Telephone Co.*, 303 F. Supp. 754 13

Clevtland Board of Education v. *LaFleur*, 414 U.S. 632 14

Corning Glass Works v. *Brennan*, 417 U.S. 188 21

Geduldig v. *Aiello*, 417 U.S. 484 ..... 3, 4, 5, 10, 11

Griggs v. *Duke Power Co.*, 401 U.S. 424 ..... 6, 7, 8, 9, 10, 11

Heart of Atlanta Motel v. *United States*, 379 U.S. 241 5

	Page
Hutchison v. *Lake Oswego School District*, 11 FEP Cases 163 (9th Cir., July 21, 1975)	15
Jefferson v. *Hackney*, 406 U.S. 535	11
Katzenbach v. *McClung*, 379 U.S. 294	5
Phillips v. *Martin Marietta Co.*, 400 U.S. 549	7, 8, 9
Satty v. *Nashville Gas Co.*, 11 FEP Cases 1 (6th Cir., Aug. 8, 1975)	14
Shapiro v. *Thompson*, 394 U.S. 618	21
Sprogis v. *United Air Lines*, 444 F.2d 1194	7

STATUTES:

Equal Pay Act of 1963: 29 U.S.C. § 206(d)	21
Title VII of the Civil Rights Act of 1964:	
§ 703(a)(1), 42 U.S.C. § 2000e-2(a)(1)	8
§ 703(a)(2), 42 U.S.C. § 2000e-2(a)(2)	6, 8, 10, 14, 19, 23
Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*	3

MISCELLANEOUS:

29 C.F.R. § 1604.10	3, 14
45 C.F.R. § 86.57, 40 Fed. Reg. 24144 (June 4, 1975)	3
118 Cong. Rec. 7168 (1972)	8
Allen, D., Fringe Benefits: Wages or Social Obligation, p. 23 (rev. ed. (1969))	16
General Electric 1957 Annual Report	16
H. Rep. 292-238, 92d Cong., 1st Sess., p. 5 (1971)	9
Hearings on S.882 and S.910 Before the Senate Subcommittee on Labor of the Comm. on Labor & Public Welfare, 88th Cong., 1st Sess., p. 142	15
Hearings on H.R. 3861 Before the Special Subcommittee on Labor, 88th Cong., 1st Sess., p. 139	15
U.S. Department of Labor, Bureau of Labor Statistics, "Digest of Health and Insurance Plans" 1971 Ed., Vol. II	21

Supreme Court of the United States

October Term 1975

No. 74-1245

LIBERTY MUTUAL INSURANCE CO., INC.,
Petitioner,

v.

SANDRA WETZEL, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND INTERNATIONAL UNION UAW AS AMICI CURIAE

This brief *amici curiae* is filed in support of the position of the respondents by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the International Union UAW with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AMICI CURIAE

The AFL-CIO is a federation of 111 national and international labor organizations, having a total membership of

approximately 14 million. As such it is the majority spokesman for the trade union movement. The International Union UAW is the largest independent industrial union in this country, having a membership of approximately 1,500,000. Women comprise a substantial portion of the membership of both organizations.

All of the women members of the *amici curiae* who are of child-bearing age are directly affected by the issues in this case. Unless the decision below is affirmed they may become disabled from work by pregnancy and nonetheless be without income protection during the period of such disability. Thus one of the first priorities of the AFL-CIO and its affiliates and of the UAW has been reform of the features of the income disability programs that discriminate against women during pregnancy. It is for this reason that the *amici curiae* have determined to take this opportunity to present their views to this court.

ARGUMENT

The only issue before the Court in this case is whether a private employer may exclude from a broad income protection program, funded in large part by the employer, disabilities which in their medical effect upon an employee's ability to work are indistinguishable from the disabilities covered by the plan but which are due to pregnancy or complications resulting directly from pregnancy. The suit was brought under Title VII of the Civil Rights Act of 1964, which makes illegal certain employment practices Congress determined impeded equal opportunity on the basis of factors which in fairness ought not be considered by employers in making decisions regarding their employees. The accepted canons of statutory construction establish that the

employment practice challenged in this case is to be judged solely against the language, structure, and intent of the legislation under which it was brought.

We believe that the respondents and various of the *amici curiae* supporting their position have conclusively demonstrated in their briefs that it was indeed Congress' intent in proscribing discrimination based on sex to ban pregnancy-based distinctions as well. In particular, Congress' recent acceptance of the regulations issued by the Department of Health, Education, and Welfare under Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 *et seq.*), see 45 C.F.R. § 86.57, 40 Fed. Reg. 24144 (June 4, 1975), which track the Equal Employment Opportunity Commission's Guidelines on pregnancy distinctions in disability programs and other employment practices (29 C.F.R. § 1604. 10(b)), is a compelling indication of Congress' understanding of what constitutes discrimination based on sex.

Liberty Mutual has chosen largely to rest its case not on statutory analysis but upon this Court's decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), which, while involving a similar exclusion from a somewhat similar program for maintenance of income during the periods an employee is medically precluded from working,[1] was determined without reference to Title VII. We believe, for the reasons detailed below, that *Geduldig* is entirely irrelevant to this

[1] The disability program in this case does differ in several significant respects from the program considered in *Geduldig*. Aside from the obvious difference—that Liberty Mutual's program is a private, employment-related plan rather than a legislative social welfare program—the Company's program excludes all pregnancy-related disabilities, rather than only those involved in a normal pregnancy. While petitioner represents that the pregnancy exclu-

case, and that this Court has already charted the course which must be followed in analyzing the impact of Title VII upon the sort of employment classification practiced by the petitioner. Applying these principles, we believe it clear that Liberty Mutual's exclusion of pregnancy-related disabilities from a broad income protection plan cannot stand.

I. SINCE TITLE VII PROSCRIBES A CLASSIFICATION SUCH AS THE PREGNANCY EXCLUSION IN THIS CASE WHICH, WHILE CAST IN NEUTRAL TERMS, ADVERSELY AFFECTS AS EMPLOYEES A SUBGROUP WHICH IS ENTIRELY COMPOSED OF ONE GENDER WITHOUT A SHOWING OF BUSINESS NECESSITY, *Geduldig* v. *Aiello*, 417 U.S. 848 (1974), HAS NO RELEVANCE TO THIS CASE.

In *Geduldig* the Court held valid under the Equal Protection Clause of the Fourteenth Amendment a state disability program which excluded from coverage disabilities due to normal pregnancy and delivery. Noting that the State had several legitimate reasons for declining to incur the relatively large additional costs involved in covering disabilities relating to normal childbirth, the Court deemed "rationally supportable" (*id.* at 495), the "state's decision not to create a more comprehensive insurance program than it has" (*id.* at 496).[2]

sion in its disability plan is construed so as to parallel the breadth of the exclusion in *Geduldig*, this is clearly not so. For example, complications such as ectopic pregnancy and Caesarean section delivery arise "wholly and solely from pregnancy." (Pet. Br. p. at 6 n. 26), but were included in the amended disability program in *Geduldig*. (See 414 U.S. 484, 490-91, n. 15; see also p. 10 *infra*.)

[2] These reasons included "maintaining the self-supporting nature of its insurance program • • • ", "distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered • • • ", and "maintaining the contribution rate at a level that will not unduly burden participating employees • • •." (*Id.* at 496.)

Had the Court said no more, *Geduldig* would clearly have little pertinence to this case, which was brought not under the Equal Protection Clause but under a statute prohibiting certain sorts of discrimination by employer *vis a vis* their employees. Petitioners do not appear to dispute the obvious proposition that Congress *could* choose to ban private employers from providing broad disability programs but excluding pregnancy-related disabilities which have precisely the same income-diminishing results, even if such exclusions would not, when practiced by a state, constitute a denial of equal protection. (Cf. *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964)). Thus, as the Court of Appeals said "our case is one of statutory interpretation [of Title VII] rather than of constitutional analysis." (511 F.2d 199, 203.)

Liberty Mutual, however, argues that in one respect *Geduldig* has entirely changed the complexion of this case. Relying heavily upon footnote 20 of *Geduldig* (417 U.S. at 496), petitioner maintains that Title VII can have no application to this pregnancy exclusion, because the classification involved is not based on "gender as such" (*id.*).[3]

But Title VII does not proscribe merely discriminations

[3] At the same time, Liberty Mutual appears to concede that *other* exclusions based on pregnancy would come within the purview of Title VII. (Pet. Br. p. 21, n. 39.) Indeed, several employment policies of Liberty Mutual based on differential treatment of pregnant women as opposed to "non-pregnant persons," *Geduldig* v. *Aiello*, 417 U.S. 484, 496, n. 20, were declared invalid under Title VII by the district court and the court of appeals, App. 153-158, 511 F.2d 199, 207-08, but petitioner did not seek certiorari

based on "gender as such." While subsection (1) of § 703 (a) of the Act (42 U.S.C. § 2000e-2(a)), proscribes discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's • • • sex," subsection (2) makes it illegal "to limit, segregate or classify • • • employees • • • *in any way* which would deprive or *tend to deprive* any individual of employment opportunities or *otherwise adversely affect his status as an employee,* because of such individual's • • • sex." (Emphasis supplied.) As the division of § 703 (a) into two subsections and the careful language of subsection (2) indicates, Congress clearly intended in subsection (2) to ban not only distinctions which are patently drawn along discriminatory lines, but also those which, while premised upon apparently neutral criteria and developed without an animus against one group or another, have the *effect,* without sufficient justification, of disadvantaging a protected group or a significant portion thereof. This is the teaching of *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431-32 (1971) where the Court noted:

> "[T]he Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation. • • • [G]ood intent or absence of discriminatory intent does not redeem employment [policies] that operate as 'built-in headwinds' for [protected] groups."[4]

---

on the validity of those practices. We show below, pp. 12-15, *infra*, that the exclusion of pregnancy from disability benefits is, for all purposes relevant to Title VII, indistinguishable from the other pregnancy exclusions which, as petitioner concedes, *are* barred by the statute.

[4] In *Griggs*, the Court relied only on subsection (2) of § 703 (a) of the Act. (401 U.S. at 426, n. 1.)

To adopt petitioner's view of Title VII as relating only to "gender as such" distinctions is to ignore the thrust of *Griggs* as well as of *Phillips* v. *Martin Marietta Co.,* 400 U.S. 549 (1971). In both instances, the employment practice found invalid did not distinguish in terms between employees of different races or sexes. In *Griggs,* the line was between employees, black and white, who passed the employer's tests and fulfilled the educational requirements and those, black and white, who did not. Similarly, the invalid classification in *Phillips* divided employees into two groups: mothers, who were all women, and non-mothers, who were of both sexes. And, the practice in *Martin Marietta* not only was neutral on its face but, on a group basis; seems to have operated so as not to exclude women "as such," since 75-80% of those hired were women.[5]

After *Griggs* and *Martin Marietta* were decided, Con-

---

[5] Similarly, *Sprogis* v. *United Air Lines,* 444 F.2d 1194 (7th Cir. 1971) involved a challenge under Title VII to a policy which discriminated not against all women but against a sub-group of women—those who were married. The court said that Title VII's reach:

> "is not confined to explicit discriminations based 'solely' on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women • • • The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex • • • or through the unequal application of a seemingly neutral company policy. Cf. Phillips v. Martin Marietta Corp., 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613." (*Id.* at 1198.)

As the *Sprogis* court went on to note, *id.* at 1198 n. 4:

> "Congress specifically rejected an amendment to the Act which would have • • • limited the force of the prohibition

gress had the opportunity in 1972 to limit subsection (2) if it so desired to require that a proscribed classification must be one which divides employees or potential employees into subgroups entirely distinct racially or sexually. Instead, Congress expanded § 703 (a)(2) while expressly endorsing *Martin Marietta* and, at the same time, rejected any interpretation which would limit *Griggs* to racial impact cases.

Thus, § 703 (a)(2) was amended in 1972 to make clear that it applies not only to employees but to applicants for employment. (Pub.L. 92-961, § 8(a) (1972).) While that amendment does not have direct relevance to this case, Congress, in adopting the amendment, did indicate its understanding that subsection (2) had and should continue to have precisely the thrust we have ascribed to it. Senator Williams, the floor manager of the bill, introduced to accompany the Conference Report a section-by-section analysis which stated that the purpose of the amendment to § 703 (a)(2) is

> "to make it clear that discrimination against applicants for employment • • • is an unlawful employment practice. This subsection is merely declarative of present law as contained in the decision in *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 549 (1971) • • •." (118 Cong. Rec. 7168 (1972).)

Since § 703(a)(1) applies in terms to failure to hire, Congress obviously intended § 703(a)(2) to continue as a separate prohibition directed at the sort of non-inclusive discrimination practiced in *Martin Marietta*. The only other remotely possible construction of § 703(a)(2)—that it ap-

against sex discrimination [by limiting Title VII to discrimination based 'solely' on gender.] Such a limitation, it was felt, would emasculate the Act. See 110 Cong. Rec. 2728, 13,825."

plies exclusively to situations such as segregated seniority lines of progression—was not Congress' understanding of the subsection, since *Martin Marietta* involved no such problem, and since such classifications have no effect upon "applicants for employment" until they are hired and become "employees."

Further, Congress in 1972 decisively rejected any implication from the brief consideration given the sex discrimination provision in 1964 that classifications which disadvantage many women but no men are to be treated differently from classifications with a similar impact upon a racial group. The Report of the House Labor Committee on the 1972 Amendments said:

> "Despite the efforts of the courts and the [Equal Employment Opportunity] Commission, discrimination against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable.
>
> "This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." (H. Rep. No. 92-238, 92nd Cong. 1st Sess., p. 5 (1971).)

Thus, *Griggs* must apply with full force to a distinction which has the effect of disadvantaging the status as employees of a large number of women but has no such impact on any man. Indeed, this case involves a distinction more clearly linked to a proscribed classification than that in *Griggs* since, like *Martin Marietta*, it involves a subgroup which is by definition composed entirely of women. While it is true that, as petitioner says in distinguishing

Martin Marietta, this case does not involve "one hiring policy for women and another for men" (*Martin Marietta*, 400 U.S. at 544, quoted at Pet. Br. p. 9), Title VII, and specifically § 703 (a) (2) thereof, is not limited to failure to hire or to *exclusion* from employment opportunities; the Act also bars practices which "*tend* to deprive any individual of employment opportunities or • • • adversely affect his *status as an employee*." (Emphasis supplied.) Thus, once it is established that a practice operates to disadvantage a subgroup composed *entirely* of members of a protected class, even if it is not composed of *all* members of that class, the questions become whether the prohibited effect has been demonstrated, and whether a "business necessity" (*Griggs*, 401 U.S. at 431), has been shown in defense.

Geduldig is of little aid in answering these questions. That case involved a "social welfare" program (417 U.S. at 495) developed by the state with certain limited objectives in mind. (See n. 1, *supra*.) In contrast to the legislative objectives the Court recognized in *Geduldig*, Liberty Mutual's disability program is not self-supporting; the Company pays a significant proportion of the cost of the program. (511 F.2d at 203; App. 91, 93, 95, 97, 99.) Therefore, Liberty Mutual cannot, as it does not, rely upon the interest in maintaining a self-supporting, low-cost insurance program, the interest which the Court found to be of overriding importance in *Geduldig*. Further, benefits under the Company's income portection plan are directly linked to time worked for the Company; employees with more than five years of service may receive benefits not simply for 103 weeks but until age 65, and benefits under the Supplementary Salary Benefits program are for as many

weeks as an employee has completed years of service. (App. 92, 94, 96, 98.)

Thus, Liberty Mutual's program is at least in part a form of compensation for work done by employees. And, as the linkage between benefits available and years worked demonstrates, the decision by the Company to provide this form of compensation was undoubtedly influenced not by humanitarian largesse but by business decisions regarding the need to retain and keep productive employees. We show in Part II, *infra*, that by excluding pregnancy disabilities from the income protection program, petitioner is "adversely affecting [women's] status as employee[s]," since, in view of the purposes behind private employer disability programs, it is treating them as easily expendable rather than valued, career employees.

Moreover, even if the interests of Liberty Mutual *were* the same as those of the statute in *Geduldig*, the analysis under Title VII in this case would differ from the constitutional analysis in *Geduldig*. For, under *Griggs*, it would not be sufficient to defend the exclusion to show it to be "rationally supportable." (*Geduldig*, 417 U.S. at 495.) Rather, the distinction, to be maintained, must rise to the level of a "business necessity." (*Griggs*, 401 U.S. at 431.)[6] In Part III, *infra*, we demonstrate that cost *alone* can rarely if ever be a "business necessity" within the meaning of *Griggs*,

[6] Petitioner suggests that it may be sufficient, under *Jefferson* v. *Hackney*, 406 U.S. 535, 549 n. 19 (1972), to demonstrated that the pregnancy exclusion is "rationally related" to the purposes of the disability program. However, *Jefferson* involved a situation in which there were merely statistical differences in the racial composition of various classifications. Here, the disadvantaged group is by definition 100% female. While *Jefferson* indicates that a showing of statistical disparity alone is insufficient to show a discrimi-

and that at any rate this employer did not make the decision to exclude pregnancy from its disability program because of actuarial considerations.

II. THE EXCLUSION OF ALL PREGNANCY-RELATED DISABILITIES FROM A BROAD INCOME PROTECTION PLAN RELEGATES AFFECTED WOMEN AND, INDIRECTLY, ALMOST ALL WOMEN OF CHILD-BEARING AGE TO A STATUS OF LESS-VALUED, LESS-PROTECTED EMPLOYEES.

Before considering the precise effects of the pregnancy-based exclusion currently before the Court, it is useful to view this particular distinction as one among numerous employment practices, many of which were engaged in by Liberty Mutual itself in the recent past and were declared invalid by the courts below, which treat specially pregnancy and childbirth for purposes of setting employment policies, with the result that the job opportunities and career advancement prospects of women are severely hampered.[7] This survey is instructive for two reasons. First, it serves to illustrate that many of these practices are, and are conceded by petitioner to be, clearly invalid under Title VII, so that the application of the Act to pregnancy-based classifications is undisputable. Second, when the effects of these practices are considered and the interrelationship between the disability insurance exclusion and the other practices is recognized, the degree to which the classification involved directly in this case disadvantages a very large group of women is clarified.

natory effect adequate to invoke *Griggs'* "business necessity" touchstone, surely a demonstration of 100% correlation between a disadvantaging exclusion and a protected group is.

[7] Experience indicates that a company would be unlikely initially to exclude pregnancy from a disability insurance program if it did not have other policies singling out pregnant women for special, disadvantaging treatment. Liberty Mutual's current policy, in which only the disability exclusion remains, is an atavism resulting from progressive changes on advice of counsel (App. 36, 38, 42-43), and from the decisions below, rather than a separate, considered decision regarding the actuarial consequences of covering pregnancy disabilities. To consider the disability exclusion in isolation, therefore, is to disregard connections necessary both for analysis of the effect on employment status and for any defense petitioner may have, see Part III, *infra*.

For example, employers have in some instances sought to exclude women generally from employment on the ground that women may become pregnant, and that the pregnancy could make continuance on the job difficult.[8] On petitioner's reasoning it would be difficult to distinguish such a policy from the exclusion in this case. If pregnancy is a sufficiently *sui generis* risk to be treated separately in a disability insurance policy, it is hard to fathom why it is not also a sufficiently special risk from the point of view of a prospective employer to merit exclusion of those most likely to incur the risk—women of child-bearing age.

Yet, it is quite apparent that such an employment policy would be a blatant violation of Title VII. To permit it would in large part wash away the sex discrimination proscription of the Act; employers could then exclude *all* women up to a certain age. Surely, Congress realized when it added sex discrimination to Title VII in 1964, and when it reiterated the seriousness of its intent in this area in 1972 (p. 9, *supra*), that any healthy woman is for many years physiologically capable of bearing children, and it proscribed discrimination based on gender nonetheless.

[8] See, e.g., *Cheatwood* v. *South Central Bell Telephone Co.*, 303 F.Supp. 754 (M.D. Ala. 1969).

Other employers have declined to hire women who were pregnant when they applied for the job.[9] Still others, including Liberty Mutual until 1970 (App. 34-35, 82, 109) have in effect fired women at some specified stage in pregnancy, permitting them to reapply for jobs later as new employees and suffering them to lose seniority privileges.[10] Obviously, these two policies are of a piece: if an employer can separate a woman once she is pregnant, even if she shows no decrease in ability to perform, it must be permitted not to hire in the first place a person who, by virtue of the company's own policies, is sure to be a short-term employee. And, if an employer may refuse to hire a woman who is pregnant, it can hardly be constrained to treat differently a woman already employed.

Yet, this Court has held that to separate a woman at some predetermined stage of pregnancy is impermissibly arbitrary, since "there are large numbers of women who are fully capable of continuing work for longer than * * * [such] regulations will allow." (*Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 646 (1974).) *LaFleur* was a Fourteenth Amendment case, and on the statutory analysis set out above it follows that such a policy would also violate § 703(a)(2) of Title VII: it would impede women who intended to continue working on the basis of a condition having no relevance to their ability to work effectively. Indeed, petitioner here appears to concede as much (see n. 3, p. 4, *supra*), and did not seek review of the holding that its similar policy was invalid.

---

[9] Cf. 29 C.F.R. § 1604.10(a).

[10] See, e.g., *Satty* v. *Nashville Gas Co.*, 11 FEP Cases 1 (6th Cir., Aug. 8, 1975).

Mandatory separation provisions, particularly where, as in *Satty, supra,* and as in Liberty Mutual's former policy, loss of seniority is involved, have ramifications beyond the loss of pay for the period women are able to work but prohibited from doing so. Women dependent upon their income but intending to have children may be constrained to accept less desirable jobs which do not have mandatory pregnancy leave in order to assure continuous employment. And women may be excluded from the most responsible jobs in which continuity is essential.[11] Further, if seniority is lost, the woman's entire career could be affected: there may be no job to return to when she has recovered or, if she does return to her old position, she will have a slower advancement to higher positions, because other employees hired later will have priority.

Closer to the instant case is the situation where an employer provides for a certain number of absences with pay for days lost due to sickness but refuses to allow use of accumulated sick leave for absences due to pregnancy, childbirth, or recovery therefrom.[12] The obvious result of such a policy, and of the exclusion in this case, is to cause the women affected to lose payment of wages or a portion thereof, even though they return to work promptly upon recovery,

---

[11] In addition, such policies have been one of the major causes of transiency of women in employment; transiency is one of the major justifications employers have given for paying lower wages to women. (See, e.g., Hearings on H.R. 3861 Before the Special Subcommittee on Labor, 88th Cong., 1st Sess., at 139, 194, 243, 252, 258-259; Hearings on S. 882 and S. 910 Before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 88th Cong., 1st Sess., p. 142, 145.)

[12] See, e.g., *Hutchison* v. *Lake Oswego School District*, 11 FEP Cases 163 (9th Cir., July 21, 1975).

and even though the effect on the employer is precisely what it would have been if any other disability had occurred—payment of funds to an absent employee and, for certain jobs, the hiring and payment of a temporary replacement.

As noted above, employers institute both sick leave and disability insurance with certain business purposes in mind, not because of a mere charitable concern with the well-being of their employees.[12] Among the purposes of providing disability insurance are: a) to remove the psychological effects of fear of loss of income when it is most needed; b) to encourage employees to receive medical attention as soon as possible, thus minimizing the severity of disabilities and assuring maximum productivity; c) to foster morale and loyalty to the company; d) to provide for maximum use by supervisors of trained employees by creating a disincentive to forcing an employee able to work to stay home. (See generally D. Allen, ***Fringe Benefits: Wages or Social Obligation***, pp. 23, 31, 33-36 (rev. ed., 1969).)

Clearly, all of these purposes apply with full force to women who are medically unable to work because of pregnancy. First, the need for assured income is if anything greater during childbirth related disabilities than during other periods an employee cannot work for physical reasons. The possibility of lost time due to physical disability is not a vague fear but a certainty during the months before labor begins.[13] And, the need for assured income during the

[12] For example General Electric, a pioneer in employee benefit programs, including disability insurance, noted in its 1957 Annual Report that the overall purpose of the benefit plans is "to attract top-quality people at all levels and encourage them to make their careers with the company." (*Id.* at 18.)

[13] One difference suggested between child-birth related and other disabilities is that the former can be planned and saved for, so that the insurance is less needed. However, many women earn so little that no amount of foresight could create an excess to cover a period without pay. In addition, other disabilities—many forms of non-emergency surgery, for example—are similarly foreseeable and could be as well provided for by months of frugality as childbirth and recovery therefrom. Finally, pregnancy itself is not necessarily foreseeable, and disabilities due to pregnancy include complications which, while the risk always exists, cannot be anticipated in any particular case.

period immediately following childbirth is heightened by the need to support the new infant during that period, and by the added cost of child-care when the woman does return to work. To assure herself of needed income, a woman intending to bear children could well choose an otherwise undesirable job providing income maintenance during pregnancy-related disabilities over a position affording better career prospects.

Second, a woman who is not covered by a disability program for the period of childbirth and recovery therefrom is likely to return to work before she is fully able to assume her former responsibilities. As a result, her performance may be impaired, with a loss of productivity which could hamper her future advancement.

Third, the exclusion of pregnancy-related disabilities is certain to make an affected woman, and indeed all women with plans to bear children, feel that they are less-valued employees, and that the employer has little regard for their careers. As a result, the desire for advancement may be impaired, and the link to the company as a long-term employer lessened.[14]

[14] Thus, the argument that the fact that many women who take pregnancy leave without pay fail to return to work justifies dis-

Finally, when the company has no responsibility for sustaining the income of a woman disabled by physiological aspects of childbirth, supervisors are encouraged to insist that she stay home, rather than accommodating the job to her condition. For example, an employer faced with the prospect of paying prolonged disability benefits to a man whose heart condition makes his stressful job impossible for him would, rationally, attempt to find a less-stressful but nonetheless productive job he can perform. If it has no such liability with regard to pregnancy-related disabilities, then in those situations in which pregnancy or complications thereof render the woman unable to perform her original job at peek efficiency,[15] the impetus will be to put her on leave rather than retain her in another capacity. Indeed, an employer who does not provide income maintenance for pregnancy-related disabilities would be much more likely to mandate the arbitrary pregnancy separation policy discussed above, pp. 14-15, *supra*, since the policy would then be cost-free to the employer.

Thus, the overall effect of the exclusion of pregnancy-related disabilities from an income protection program is, like the other special disadvantages imposed upon pregnant women, to relegate pregnant women, and women who may become pregnant, to a special, second-class status with

parate treatment of pregnancy-related disabilities (see, e.g., Brief Amicus Curiae of American Life Insurance Association and Health Insurance Association of America on Behalf of Petitioner, at 30-31) is entirely circular. If an employer excludes such women from a program designed to promote employees' loyalty to the company, it is little wonder that they do not display that loyalty.

[15] There are a few positions, for example, telephone lineman, in which the added girth of pregnancy alone could make the job difficult to perform.

regard to career advancement and continuity of employment. Petitioners' only response to this analysis seems to be that it would be anomalous to require expanding a general disability program to cover pregnancy when an employer need have no such program and can have a very limited one. (Pet. Br. pp. 23-24.) However, if an employer has no program at all for insuring income to disabled workers, he is not creating two groups of employees, some valued and protected and others, all of whom are women, unvalued and unprotected. Similarly, if an employer chooses to provide a limited program applicable only to a few major disabilities which occur without regard to sex, he is not separating out a large group of women for treatment which will impair their career advancement and continuity. Petitioner's argument, therefore, misses the entire thrust of § 703(a)(2), which is to prevent *discriminatory* impact on certain groups which tends to hamper their career opportunities *vis a vis* other classes of employees. Since this exclusion has such an impact upon a group exclusively female, it violates § 703 (a)(2), unless an overriding justification can be shown.

III. Petitioner has made no showing of business necessity sufficient to justify the exclusion of pregnancy from its disability insurance program.

Since respondents and other *amici curiae* appearing on their behalf have given careful attention to disproving the justifications offered by petitioner for its policy, we will provide only some general comments regarding these justifications. Most simply, the argument made is that to cover pregnancy-related disabilities will be costly. We do not quarrel with that general contention, although we caution the Court that the precise extent of cost depends upon assumptions which must be analyzed carefully to assure

that sexual stereotypes are not employed.[16]

But it should be obvious that cost alone cannot be a defense to a discriminatory employment practice otherwise banned. Clearly, it would be much cheaper to pay some blacks less than all whites, or to use an example more closely related to this case, to forego testing a woman's physical ability for a job when it is known that most women are physically unable to perform it. The requirements for validating employment tests approved in *Allemarle Paper Co.* v. *Moody*, — U.S. —, 43 U.S.L. Wk. 4880 (June 25, 1975) are likely to be quite expensive, and the cost of employing less-qualified employees for lack of a suitable test is also high. Yet, the Court has not regarded expense as an excuse for using a test not proven to be job-related if discriminatory impact is shown.

[16] Two obvious examples of such stereotypes are the assumption that women will stay home even when they are no longer disabled and the concommitant assumption that the average period of pregnancy disability will be as long as fifteen weeks. For example, petitioner stated in its Motion for Reconsideration in the District Court (App. 165): "[B]ecause employees of [Liberty Mutual] can, in some situations make as much or more money by receiving disability income, it can be assumed that females on pregnancy leave of absence will remain home longer than normal • • • This is not to be critical, but human nature dictates that if the female can be paid for staying home, she will." The District Court responded to this claim with a perceptive insight into the sexual stereotype involved.

> "[A]s a trial judge who has seen hundreds of cases of soft tissue damage arising from the so-called 'whip lash' type of injuries which produce few observable objective symptoms the court sees no basis for assigning the tendency to malinger as a sex-related characteristic. If, as defendant suggests, the employee can make as much or more money on disability than at work be true, then the fault lies with the particular insurance plan and not with the female sex." (App. 184.)

Further, this Court has construed a statute analagous to Title VII, the Equal Pay Act of 1963 (29 U.S.C. § 206 (d)(1)), always to require the wages of the disadvantaged sex to be raised (*Corning Glass Works* v. *Brennan*, 417 U.S. 188, 207 (1974)), regardless of the costs involved. Similarly, the Court, in dealing with the requirement of showing a compelling interest in equal protection cases, has held that cost alone cannot constitute the requisite justification. (See, e.g., *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969).) The Title VII analysis must be parallel in order to give full effect to Congress' purpose of ending employment policies based on impermissible factors.

Second, even if there are situations in which the cost of equality would be so great as to justify a facially-neutral policy with a completely disparate effect by gender, petitioner here would not be entitled to prevail on the basis of business necessity. No attempt was made in the District Court to demonstrate the actual cost of adding pregnancy-disability coverage to the income protection plan.[17] Moreover, petitioner did not arrive at the decision to exclude pregnancy-related disabilities from its income protection plan on the basis of actuarial information regarding the cost thereof. Rather, the reason for including almost all medically-confirmed disabilities except pregnancy [18] appears

[17] The excuse given was that no such statistics are available because no companies cover such disabilities. In fact, however, a large proportion of companies with disability insurance programs *do* cover pregnancy. See, for a list of major companies providing such coverage, U.S. Department of Labor, Bureau of Labor Statistics, "Digest of Health and Insurance Plans" 1971 Edition, Vol. II.

[18] The only medically-supervised relatively long-term disabilities not covered are those relating to war and those which are self-

to have been merely that it was believed to be one of many disadvantages visited on pregnant women which the company might be able to continue.[19]

Surely, the defense of business necessity in the Title VII context requires a consideration only of the reasons an employer actually instituted a program, not of the reasons it could have done so. To characterize as a business necessity a factor the company did not even consider in a businesslike way seems a contradiction in terms. Since Liberty Mutual has shown no considered necessity for the pregnancy exclusion, the demonstration in Parts I and II *supra* suffices to require affirming the court below.

---

inflicted. (App. 99.) While petitioner seeks to characterize the former exclusion as relating primarily to men (Pet. Br. p. 19), presumably men engaged in combat would not be in the employ of the company when the disability began, or on "vacation or paid excused absence" (App. 100), and thus would not be eligible for the benefits. Rather, the exclusion must cover those, men or women, injured by acts of war while *not* in the armed forces, and is included, in all likelihood, because a large proportion of the work force could be affected at one time. It is impossible to fiscally plan for such a major but unknown catastrophe.

The self-inflicted injury exclusion also has a justification other than cost alone. For the company may legitimately wish to discourage its employees from injuring themselves, while there is little legitimate reason for discouraging women from bearing children.

[19] See the deposition of petitioner's manager of personnel services:

"Q. Does the income protection plan cover disability related to pregnancy?

"A. No.

"Q. Are there any other disabilities that it doesn't cover?

"A. Any disability that is not established by medical evidence.

"Q. Any other?

"A. I can't think of any.

"Q. Can you tell me why it doesn't apply to pregnancy?

"A. On advice of counsel." (App. 42-43.)

CONCLUSION

Petitioner engaged in activity which is a prima facie violation of § 703(a)(2) of Title VII, and presented no viable defense thereto. Therefore, the decision of the Court of Appeals must be affirmed.

Respectfully submitted,

STEPHEN I. SCHLOSSBERG
1125 15th Street, N.W.
Washington, D.C. 20005

JOHN FILLION
8000 East Jefferson
Detroit, Michigan

Attorneys for UAW

J. ALBERT WOLL
ROBERT C. MAYER
736 Bowen Building
815 15th St., N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th St., N.W.
Washington, D.C. 20006

Attorneys for AFL-CIO

Supreme Court, U. S.
FILED
SEP 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974
No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A Corporation,
Defendant-Petitioner,

vs.

SANDRA WETZEL and MARI ROSS, on behalf of themselves and all others similarly situated,
Plaintiffs-Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF BLANK GOODMAN KELLY RONE & STANLEY ON BEHALF OF PLAINTIFFS-RESPONDENTS

Diane Serafin Blank
Nancy E. Stanley

BLANK GOODMAN KELLY
RONE & STANLEY
36 West 44th Street
New York, New York 10036
(212) 869-0020

I N D E X

Page

Table of Authorities iii

Statement of Interest of Amicus Curiae 1

Summary of Argument 4

ARGUMENT

I Title VII is a Broad Remedial Statute Designed to Eliminate All Policies Having a Sex-discriminatory Impact in Employment. 7

A. Language and Legislative History 7

B. Judicial Interpretation . 10

II Differential Treatment of Pregnancy Disabilities is One of the Many Practices Used by Employers to Discriminate Against Women Workers and Maintain Them in an Inferior Position in the Workforce. 14

A. Historical Position of Women in the Workforce . . 14

B. Position of Women in the Workforce Today 30

Page

1. Industrial and Occupational Segregation 30

2. Unemployment 35

3. Unionization 37

4. Earnings Gap 40

5. Fringe Benefits 45

III Title VII Prohibits Pregnancy Discrimination by Employers, Regardless of How a Pregnancy Exclusion is Treated Outside the Employment Context in a Social Welfare Program Enacted by a State Legislature. . . . 53

IV Any Increased Expense of Providing Pregnancy Disability Benefits is Not a Justification for Denying Them. 62

CONCLUSION 73

TABLE OF AUTHORITIES

Page

Cases

Adkins v. Children's Hospital, 261 U.S. 525 (1923) 26,27

Albemarle Paper Co. v. Moody, 43 U.S.L.W. 4880 (U.S., June 25, 1975) 55

Bosley v. McLaughlin, 236 U.S. 385 (1915) 25

Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) 47

Communications Workers of America v. American Telephone & Telegraph Co., 513 F.2d 1024 (2d Cir 1975) . . . 3,57

Communications Workers of America v. South Central Bell Telephone & Telegraph Co., No. 73-1771 (E.D. La.) (presently pending) 3

Corne v. Bausch & Lomb, Inc., 390 F.Supp. 161 (D.C. Ariz. 1975) 21

Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 61

EEOC Decision No. 74-118, CCH Emp. Prac. Guide, ¶6431 (April 26, 1974) 45

Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) 56

Page

Frontiero v. Richardson, 411 U.S. 677 (1973) 58-59

Geduldig v. Aiello, 417 U.S. 484 (1974) 57-58,59,60

Gilbert v. General Electric Co., 10 FEP Cases 1201 (4th Cir. 1975) 3,57

Goesaert v. Cleary, 335 U.S. 464 (1948) 25

Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972) . . 13

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 10-11,12,55

Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973) . . 12

Holthaus v. Compton & Sons, Inc., 514 F.2d 651 (5th Cir. 1975) . . 57

Hutchison v. Lake Oswego School Dist., No. 74-3181 (9th Cir., July 21, 1975), aff'g 374 F.Supp.1056 (D. Ore. 1974) 57

Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971). 13

Kahn v. Shevin, 416 U.S. 351 (1974). 61

LeBlanc v. Southern Bell Tel. & Tel. Co., 460 F.2d 1228 (5th Cir. 1972) 29

Page

Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970) 12

Manhart v. Department of Water & Power, 10 FEP Cases 101 (C.D. Cal. 1975) 45

Manning v. International Union, 466 F.2d 812 (6th Cir. 1972) . . . 29

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 11

Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975) . . . 13

Miller v. Wilson, 236 U.S. 373 (1915) 25

Moorehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936) 27

Muller v. Oregon, 208 U.S. 412 (1908). 25,26

People v. Charles Schweinler Press, 214 N.Y. 395, 108 N.E. 639 (1915) . 25

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) . 12

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) 55

Radice v. New York, 264 U.S. 292 (1924). 25

Page

Reed v. Reed, 404 U.S. 71 (1971). 58-59

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971) 11-12,71

Rogers v. Equal Employment Opportunity Commission, 454 F.2d 234, (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972). 54

Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) . . 11,29

Satty v. Nashville Gas Co., 11 FEP Cases 1 (6th Cir. 1975). . 57

United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973). . . 12

United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973) 12

Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) 11,62

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) 27,61-62

Wetzel v. Liberty Mutual Insurance Co., 372 F.Supp. 1146 (W.D.Pa. 1974) . . 69
508 F.2d 239 (3d Cir. 1975) 69
511 F.2d 199 (3d Cir. 1975) . . . 57,70

Page

Constitutional Provisions:

United State Constitution
Fourteenth Amendment . . . 6,58-60

Federal Statutes:

20 U.S.C. §§1681 et seq. (Supp. III, 1973) (Title IX of the Education Amendments of 1972). 56

29 U.S.C. §§201 et seq. (1970) (Fair Labor Standards Act) 27

29 U.S.C. §206(d)(1970) (Equal Pay Act of 1963) 61

42 U.S.C. §§2000e et seq. (1970) (Title VII of the Civil Rights Act of 1964) . . . . . .passim

Other Authorities:

Blitz, Women in the Professions, 1870-1970, U.S. Dep't of Labor, Monthly Lab. Rev. 34 (May, 1974). 34

Brief for EEOC as Amicus Curiae, Corne v. Bausch & Lomb, Inc., No. 75-1857 (10th Cir., appeal docketed ___, 1975) 21

Brief for Petitioner 66

Page

Chafe, W. H., The American Woman: Her Changing Social, Economic, and Political Roles,1920-1970 (1972) 17,18,19 22,23,24 28,68

Citizens' Advisory Council on the Status of Women, Women in 1974 (1975). 42

110 Cong. Rec. 2728 (1964) 9

110 Cong. Rec. 13837(1964) (Remarks of Senator Magnuson) 9

110 Cong. Rec. 13838(1964) 9

Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L.Rev. 1598 (1969) 8

Decrow, K., Sexist Justice (1974). . . 44

40 Fed. Reg. 24128 (1975) 57

40 Fed. Reg. 24144 (1975) 57

Flexner, E., Century of Struggle (1968) 20

Hayden, T., Punishing Pregnancy: Discrimination in Education, Employment, and Credit (ACLU Women's Rights Project Report 1973) 47

Hearings Before the Joint Economic Comm. on The Economic Problems of Women, 93rd Cong., 1st Sess. (1973) . 35-36 43,45 68

Page

Hearings on §805 of H.R. 16098 Before the Special Subcomm. on Educ. of the Comm. on Educ. & Labor, 91st Cong., 2d Sess. (1970) 21-22

Hedges & Bemis, Sex Stereotyping: Its Decline in Skilled Trades, U.S. Dep't of Labor, Monthly Lab. Rev. 14 (May, 1974). 33

Insurance Commissioner's Advisory Task Force on Women's Insurance Problems, Pennsylvania Insurance Dep't, Final Report and Recommendations (1974). 50

1 Labor Pains 10 (1975) 33,36

Peratis & Rindskopf, Pregnancy Discrimination As a Sex Discrimination Issue, ___ Women's Rights L.Reptr. ___ (1975) 48

Public Health Service, U.S. Dep't HEW, Prevalence of Chronic Circulatory Conditions United States 1972, No. (HRA) 75-1521, Series 10-No. 94 (1974) 63, 65

Public Health Service, U.S. Dep't HEW, Prevalence of Selected Chronic Digestive Conditions, United States —July-December 1968, No. (HRA) 74-1510, Series 10-No. 83 (1973) . . 66

Page

Public Health Service, U.S. Dep't HEW, Prevalence of Selected Chronic Respiratory Conditions, United States-1970, No. (HRA) 74-1511, Series 10-No. 84 (1974) 64,65

Public Health Service, U.S. Dep't HEW, Prevalence of Chronic Skin and Musculoskeletal Conditions, United States-1969, No. (HRA) 75-1519, Series 10-No. 92 (1974). 66

Raphael, Working Women and Their Membership in Labor Unions, U.S. Dep't of Labor, Monthly Lab. Rev. 27 (May,1974) 39

S. Rep. No. 91-1137, 91st Cong. 2d Sess. 1 (1970) 9-10

Sex Discrimination Guidelines, 29 C.F.R. §1604.9 (1974) 5,70

Sex Discrimination Guidelines, 29 C.F.R. §1604.10 (1974) 5,54

Smuts, R.W., Women and Work in America (1974). 15,16,20 20-21,32 35

U.S. Commission on Civil Rights, Women and Poverty (1974). . . . 31,41,46

Waldman & McEaddy, Where Women Work - An Analysis by Industry and Occupation, U.S. Dep't of Labor, Monthly Lab. Rev. 3 (May, 1974) 30,31,32 34,41,42 43

	Page
The Washington Post, July 10, 1975, at A7, col. __	57
The Washington Star, June 5, 1975, editorial page, col. . . .	57
Wertheimer, B.M. & A.H. Nelson, Trade Union Women (1975)	38
Women's Bureau, U.S. Dep't of Labor, Fact Sheet on the Earnings Gap (undated)	41
Women's Bureau, U.S. Dep't of Labor, 1969 Handbook on Women Workers	31,37 40,42 43,44
Women's Bureau, U.S. Dep't of Labor,The Myth and the Reality (May, 1974)	52
Women's Bureau, U.S. Dep't of Labor, Women Workers Today (1974). . . .	31

STATEMENT OF INTEREST

BLANK GOODMAN KELLY RONE & STANLEY is a feminist law firm created in 1973 in New York City. It was founded in part to provide women with a source of competent legal services and to create a role model for women to initiate their own professional and business enterprises. But in addition, one of the express purposes of the firm -- an outgrowth of the feminist commitment of its founders -- was to meet the growing need to challenge through the legal system those practices and policies which discriminate against women in our society. To help fulfill its purposes, the firm received a foundation grant for special test-case litigation in certain areas where sex-based discrimination has harmed the civil rights of large numbers of women.

The policy at issue in this case is precisely the kind of discriminatory policy which this firm was created to challenge: an employer's efforts to penalize its female workers by denying them disability benefits for a condition -- pregnancy -- unique to them. Amicus believes that its special perspective on the issue before this Court will be of assistance to the Court in its deliberations. As a firm, we are filing this brief amicus curiae to assert our interest in and commitment to changing this policy for all women affected. We also assert a personal interest, for, as working women ourselves, we too are affected by discriminatory policies of this kind which inhibit the professional growth and development of women.

This firm has filed a brief amicus curiae on the issue of denial of disability benefits for pregnancy-related

disabilities in three separate courts prior to this time: the Fourth Circuit Court of Appeals in Gilbert v. General Electric Co., 10 FEP Cases 1201 (1975); the Second Circuit Court of Appeals in Communications Workers of America v. American Telephone & Telegraph Co., 513 F.2d 1024 (1975); and the United States District Court for the Eastern District of Louisiana in Communications Workers of America v. South Central Bell Telephone & Telegraph Co., No. 73-1771, a case which is presently pending. We have received permission of the attorneys for the parties to file a brief in this case, and their consents have been filed with the Clerk of the Court.

Amicus has sought to present aspects of the issue which we believe have not been treated by the parties to the litigation or by other amici. Specifically,

we have attempted to document the depth and breadth of women's participation in the workforce and the extent to which discrimination against women workers has always been a dominant feature of American labor history. In our view, the denial to women of benefits for pregnancy-related disabilities is one more example of the way in which employers, at best, have ignored the needs of female workers and, at worst, have exploited them as a source of cheap labor. As long as such treatment is allowed to continue, fair employment laws for women will constitute an empty promise.

SUMMARY OF ARGUMENT

This is a brief amicus curiae in support of the proposition that Defendant-Petitioner Liberty Mutual Insurance Company's income protection plan for its employees -- a plan

which covers many temporary disabilities, but excludes all disabilities related to pregnancy -- discriminates against women employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq. (1970). Specifically, amicus argues that such an exclusion is discrimination on account of sex which violates both Title VII and the regulations issued pursuant to the Act relating to fringe benefits and pregnancy, 29 C.F.R. §§1604.9 and 1604.10(1974), respectively.

First, as is evident from both the language and the legislative history of the Act, Title VII is a broad remedial statute designed to outlaw all discriminatory treatment between men and women in employment, including not only those practices which are overtly discriminatory, but also those practices which have a

detrimental effect on classes of workers protected under the Act.

Second, for nearly two hundred years American companies have systematically paid women low wages, relegated them to the most distasteful jobs and treated them generally as an easily exploited source of cheap labor. Differential treatment of pregnancy disabilities is merely one more example in a long history of discrimination against members of the female workforce.

Third, Title VII prohibits pregnancy discrimination by employers against their employees regardless of whether or not similar policies incorporated in the social welfare legislation of a state may withstand constitutional scrutiny under the Fourteenth Amendment.

Finally, amicus argues that any increased costs to an employer of providing pregnancy benefits is not, under

Title VII, a defense to denying them, since denying such benefits serves only to reinforce already deeply entrenched patterns of discrimination against women workers.

ARGUMENT

I

TITLE VII IS A BROAD REMEDIAL STATUTE DESIGNED TO ELIMINATE ALL POLICIES HAVING A SEX-DISCRIMINATORY IMPACT IN EMPLOYMENT.

A. Language and Legislative History

Title VII was enacted not only to eliminate employment practices discriminatory on their face, but also to strike down the conditions, policies and practices that lead to unequal employment opportunity for protected classes of workers. This purpose is evident from both the language of the Act and its legislative history.

The Act by its terms prohibits practices which discriminate "in any way," which "tend to deprive" persons of equal employment opportunity or which "otherwise adversely affect" employment conditions for minorities or women. §703(a)(2) of the Act, 42 U.S.C. §2000e-2(a)(2). These phrases make it clear that in adopting Title VII Congress intended "to define discrimination in the broadest possible terms."[1/]

The legislative history to Title VII also reflects the congressional intention to strike at the broad range of employment practices that have a detrimental effect on protected classes of workers. For example, a proposed amendment to Title VII that would have limited the Act to discrimination based "solely" on sex,

1/ Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L.Rev. 1598, 1612 (1969).

race, religion or national origin was twice defeated. 110 Cong. Rec. 2728 (1964); 110 Cong. Rec. 13838 (1964). As Senator Magnuson pointed out when the amendment was rejected, such a provision "would so limit this section as probably to negate the entire purpose of what we are trying to do" in passing Title VII. Id. 13837.

Moreover, when Congress amended Title VII in 1972, it reaffirmed the Act's broad, remedial purposes in the strongest terms. The Senate Committee on Labor and Public Welfare characterized the Act as follows:

> Employment discrimination, as viewed today, is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effects of pre-act discriminatory practices through

various institutional devices, and testing and validation requirements. In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful. S. Rep. No. 91-1137, 91st Cong., 2d Sess.1 (1970), at 4.

B. Judicial Interpretation

In applying Title VII, the courts have adopted the same broad view. In this Court's words in Griggs v. Duke Power Co., 401 U.S. 424 (1971):

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. Id. at 431.
>
> The objective of Congress . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees. Id. at 429-30.
>
> . . . Congress directed the thrust of the Act to the consequences of

> employment practices, not simply the motivation. Id. at 432. 2/

In other words, the thrust and purpose of Title VII is to eliminate all practices, whether they are overtly discriminatory or have a discriminatory impact, which create artificial barriers to equality of employment opportunity. 3/

2/ Accord, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973): The purpose behind Title VII is ". . . to eliminate those discriminatory practices and devices which have fostered . . . stratified job environments to the disadvantage of minority citizens." (emphasis added).

3/ There are two principal defenses to discrimination under Title VII, and both have been narrowly construed. One is the "bona fide occupational qualification," applicable only to overt policies of discrimination against women. See §703(e) of the Act, 42 U.S.C. §2000e-2(e). The BFOQ justifies a refusal to hire women for certain jobs only if it is reasonable to assume that no woman, anywhere, could perform the job in question. Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); cf. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

The second defense is the "business necessity" test, applicable where a policy is facially neutral but discriminates in its effect. This defense is also available only under the very narrowest circumstances: ". . . the business purpose must be

[footnote continued]

Operating from this perspective, the courts have struck down as discriminatory a wide range of employment practices including educational and testing requirements,[4] word-of-mouth recruitment practices,[5] departmental seniority systems,[6]

[footnote 3/ continued]

sufficently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential [discriminatory] impact." Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971) (emphasis added). See also, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973).

4/ Griggs v. Duke Power Co., 401 U.S. 424 (1971) (disproportionate impact on blacks).

5/ United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973) (disproportionate impact on blacks).

6/ Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970) (disproportionate impact on blacks).

height-and-weight requirements for particular jobs,[7] rules against hiring persons with arrest records,[8] and rules preventing inter-departmental transfers.[9] The focus in all these cases was not to determine whether the policy was intentionally discriminatory, but whether its effect was to reinforce patterns of discrimination and lock women or minorities even more firmly into an inferior position in the workforce. As we will show below, the denial of pregnancy benefits is a policy with precisely this kind of impact. Since only women become pregnant,

7/ Meadows v. Ford Motor Co., 510 F.2d 939, (6th Cir. 1975) (disproportionate impact on females).

8/ Gregory v. Litton Systems, Inc. 472 F.2d 631 (9th Cir. 1972) (disproprotionate impact on blacks).

9/ Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971) (disproportionate impact on blacks).

denying benefits for only those disabilities associated with pregnancy inevitably injures women workers to a disproportionate extent. Consequently, such a policy is exactly the kind of employment practice to which Title VII applies.

II

DIFFERENTIAL TREATMENT OF PREGNANCY DISABILITIES IS ONE OF THE MANY PRACTICES USED BY EMPLOYERS TO DISCRIMINATE AGAINST WOMEN WORKERS AND MAINTAIN THEM IN AN INFERIOR POSITION IN THE WORKFORCE.

A. Historical Position of Women in the Workforce

Historically, women workers have always been among the most exploited members of the American labor force. Since women first entered the industrialized workforce, employers have sex-segregated them by industry, have relegated them to the jobs with the least pay and prestige,

have paid them less than men for comparable work, and have denied them entry or promotion into higher level, more lucrative and prestigious positions.

In the eighteenth century, when women first entered the workforce in large numbers, they were immediately channeled into low paying jobs and industries. They were heavily concentrated in the service industries -- traditionally the lowest paying jobs with the least status -- primarily because such jobs were the natural extensions of the nursing, cooking, cleaning, teaching, and sewing functions women perform as homemakers and mothers. Laundry work, for example, was thought fit for only "wimmin" and "naygurs."[10/] For women with some education

---

10/ R. W. Smuts, Women and Work in America 88 (1974) [hereinafter cited as Smuts].

and middle-class status or aspirations, teaching was the only job open to them until the late nineteenth century.[11]

It was only during times of war and severe labor shortage that women workers were given an opportunity to perform "men's jobs." During World War I, for example, women swarmed into factories to replace men at the front. The number of women employed in the iron and steel industries trebled. Over 100,000 women entered munitions factories while countless others served as streetcar conductors, elevator operators, furnace stokers and brick layer helpers. The Women's Bureau required four pages to list all the jobs in which women substituted for men during the fighting. The Government appointed female lawyers to its advisory committees and for the first time, female doctors gained access to the U.S. Public

11/ Id. 19.

Health Service. The same pattern was repeated during World War II when war industries were confronted with a severe labor shortage. Rosie the Riveter became a new heroine and industries established day care centers to meet the child-care needs of the suddenly indispensable woman worker.[12]

After both wars, however, opportunities for women in male-dominated jobs disappeared as quickly as they had been created. The industry-supported day care centers were dismantled and women were forced to resign their jobs

12/ W. H. Chafe, The American Woman: Her Changing Social, Economic, and Political Roles, 1920-1970, at 51, 162-63 (1972) [hereinafter cited as Chafe].

to make way for returning veterans.[13] As the reformer Mary Van Kleeck wrote after World War I, "When the immediate dangers . . . were passed, the prejudices came to life once more."[14]

Women have always been regarded as marginal workers, the most expendable members of the labor force when times are hard. During the Depression, the unemployment rate among women far exceeded that of men. By 1938, 22.1% of women were totally unemployed, as compared with 14.3% of men.[15] The woman

13/ Typical of the prevailing attitude was the pronouncement, in 1919, by the Central Federated Union of New York, that "the same patriotism which induced women to enter industry during the war should induce them to vacate their positions after the war." Women professionals fared no better. After the Armistice, twenty female judges in New York were forced to resign to make way for returning veterans. Id. 53.

14/ Id. 54.

15/ Id. 270, n. 20

wage earner, Senator Robert Wagner concluded, was the "first orphan in the storm."[16]

Where women did hold jobs, they labored under extremely poor working conditions, particularly in the low-wage, marginal industries where many women tended to be employed. For the most part shops were small, housed in badly lit, steaming firetraps where sanitary conditions were abhorrent and the noise deafening. Many factories, in the garment and food trades in particular, were overrun with vermin. The air was contaminated by lint, tobacco, glass or mica dust, or poisonous with dangerous fumes. Floors were slimy from constant expectoration, and tuberculosis, pneumonia and respiratory diseases were common. Crushed

16/ Id. 58.

fingers and limbs were the rule wherever machines were used.[17] In 1911, 146 women died in a fire at the Triangle Shirtwaist Factory because of inadequate safety measures and because factory owners had barred the exits to the stairways, allegedly to prevent the women from stealing merchandise or leaving their machines in a sudden strike.[18] In addition to unsanitary and unsafe working conditions, women also were forced to endure the sexual advances of their employers.[19]

17/ See Smuts, supra note, 10 at 74-79.

18/ E. Flexner, Century of Struggle 363, n.1 (1968).

19/ Employers and supervisors were always in position to force their attentions on women workers, through threats of termination, or alternatively, promises of promotion. Sexual abuse of this kind was particularly common among domestic employees. Some employment agencies for domestic workers were procurers for houses of prostitution, and, in 1887, public concern over the moral conditions of women's employment led to an official investigation by the U.S. Bureau of Labor which found that 30%

[footnote continued]

Despite these abuses, however, when the collective conscience of America pressed for labor reform in the late nineteenth century, women were largely overlooked. The male trade union movement in its early stages resisted the organization of women workers, fearing their competition.[20] As unionization gained ground

[footnote 19/ continued]

of the prostitutes interviewed had previously worked as domestics. Smuts, supra note 10, at 72-73, 88-89.

Lest it be thought that sexual harassment on the job is a thing of the past, however, see Corne v. Bausch & Lomb, Inc., 390 F.Supp. 161 (D.C. Ariz. 1975). In its amicus curiae brief in that case, the Equal Employment Opportunity Commission has taken the position that such intimidation is a prohibited discriminatory practice. Brief for EEOC as Amicus Curiae, Corne v. Bausch & Lomb, Inc., No. 75-1857 (10th Cir., appeal docketed ____, 1975).

20/ Gunnar Myrdal's appendix to the classic An American Dilemma, "A Parallel to the Negro Problem," notes that:

> All over the world men have used the trade unions to keep women out of competition. Woman's competition has, like the Negro's, been particularly obnoxious and

[footnote continued]

among the male-dominated skilled trades, union members, like those in the American Federation of Labor, showed little inclination to spend money to organize their sisters employed in the low-paid unskilled trades.[21] When women did attempt to organize themselves in these industries, they were rejected for membership in the male unions on the grounds that

[footnote 20/ continued]

> dreaded by men because of the low wages women, with their few earning outlets, are prepared to work for.

Cited in Hearings on §805 of H.R. 16098 Before the Special Subcomm. on Educ. of the Comm. on Educ. & Labor, 91st Cong., 2d Sess., Pt. 2, at 901, 905-06 (1970).

The International Moulders Union, for example, resolved to restrict the employment of women in all foundries and jobs "recognized as men's employment." Chafe, supra note 12, at 77. Early successful but short-lived women's unions, such as the laundry workers of Rochester, New York, and the shoemakers of Lynn, Massachusetts, were supported by male workers largely because women and men did not compete in these female-intensive industries.

21/ Despite repeated requests, the AFL did not hire a full-time female organizer on a long-term basis until 1918. Chafe, supra note 12, at 76.

they were unskilled, rather than skilled, workers.[22] The problems of organization were compounded by the early decisions of male trade union leaders to discontinue chartering separate women's locals. This policy ensured that women would remain a powerless minority with no opportunity to develop their own leaders or focus on problems peculiar to their sex.

By the beinning of the twentieth century union attitudes toward female workers had progressed from supreme indifference to open hositility. AFL President Samuel Gompers barred the Women's Trade Union League from the

22/ E.g., female printers, working side by side with males, were denied membership in the International Typographical Union for this reason. Candy workers in Philadelphia, hairdressers in Seattle and streetcar conductors in Cleveland met the same rebuff. Id. 78.

1905 AFL convention, attacked the presence of married women in the work force and refused to support a strike by female telephone operators in Boston.[23] Even during the famous garment workers strikes in 1909, Gompers openly questioned the ability of women to maintain sufficient cohesiveness and determination to form a viable union.[24] Gains made by female workers during World War I were quickly extinguished by union maneuvers such as the post-Armistice strike by male workers in Cleveland to force female streetcar conductors out of work.[25]

23/ Id. 76-77.

24/ The strike of the International Ladies Garment Workers Union during the harsh winter of 1909, described as the "Uprising of the 20,000," was the first general strike by female workers, and was a potent refutation of the argument that women could not withstand a long hard fight. But the settlements individually negotiated with each shop were probably far weaker than could have been achieved with broad union support.

25/ Chafe, supra note 12, at 53.

Without union support to fight for improved working conditions, women turned to state legislatures for protection through the passage of maximum-hour and minimum-wage legislation. This Court's support for Oregon's maximum-hour legislation for female laundry workers against constitutional attack in Muller v. Oregon, 208 U.S. 412 (1908), paved the way for passage of a rash of state "protective" laws that applied to women workers only. In addition to the ten-hour laws for women laundry workers upheld by Muller, eight-hour laws,[26] laws governing numerous other occupations,[27] and laws prohibiting night work,[28] all were upheld on

26/ E.g., Miller v. Wilson, 236 U.S. 373 (1915); Bosley v. McLaughlin, 236 U.S. 385 (1915).

27/ E.g., pharmacists, Bosley v. McLaughlin, 236 U.S. 385 (1915); and later, bartenders, Goesaert v. Cleary, 335 U.S. 464 (1948).

28/ Radice v. New York, 264 U.S. 292 (1924); People v. Charles Schweinler Press, 214 N.Y. 395, 108 N.E. 639 (1915).

the authority of Muller. While their origins -- and immediate effect -- were to relieve some of the worst abuses of the sweat shop system, these statutes were all used ultimately not to protect women workers but to exclude them from the most desirable jobs. As a result, large numbers of working women became isolated from the benefits of full participation in the workforce for decades to come.

Minimum wage legislation, compared to legislation restricting the hours and occupations in which women worked, fared less well in the courts. A District of Columbia minimum wage law which applied only to women was struck down in Adkins v. Children's Hospital, 261 U.S. 525 (1923). It was not until unemployment, starvation wages, conditions of profound hardship, and the continuing exploitation

of women workers peaked during the Depression of the 1930's that state legislatures took action and this Court re-evaluated its former position.[29] Following the passage of minimum wage laws for women by several state legislatures, the federal government enacted the National Industrial Recovery Act ("NIRA") in June 1933 and the Fair Labor Standards Act ("FLSA")[30] in 1938, both of which set minimum wages for men and women in occupations affecting interstate commerce. These laws, like their counterparts regulating hours and occupations, ultimately hurt women more than they helped. Under

---

29/ See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), holding that a state minimum wage law did not violate the Fourteenth Amendment due process clause, and overruling Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936), and Adkins v. Children's Hospital, 261 U.S. 525 (1923).

30/ 29 U.S.C. §201 et seq. (1970).

the NIRA one out of every four industrial codes permitted women to receive a lower minimum wage than men. The businesses affected were precisely those which employed the largest percentages of female workers.[31]

Thus, although protective labor legislation was ostensibly enacted to protect women from the harsh working conditions to which they were subject because they were not unionized, in fact it created a system which ensured that women would remain at the very bottom of the economic and employment ladder. Legislation like the NIRA reinforced the tradition of paying women less. Laws which theoretically

31/ In the cloak and suit industry, for example, women's basic wage was ten cents an hour less than men's. Women employed in laundries were allowed to earn as little as fourteen cents an hour, while waitresses in some areas received only twelve cents. Chafe, supra note 12, at 85.

protected women from difficult jobs really operated to preserve the highest paid jobs for men. For example, some laws prevented women from selling drinks or working at night, when tips were greater. Women could not take night shifts at factories and earn overtime rates. Nor could they enter the highly unionized heavy industries where salaries were higher and jobs more secure. In the last analysis, "protective" legislation protected male prerogatives more efficiently than it protected women's rights to full equality of employment in a safe and humane working environment.[32]

32/ Because of their discriminatory impact on women workers, state protective laws have now been universally rejected as a defense, under Title VII, to an employer's disparate treatment of female employees. Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); LeBlanc v. Southern Bell Tel. & Tel. Co., 460 F.2d 1228 (5th Cir. 1972); Manning v. International Union, 466 F.2d 812 (6th Cir. 1972).

B. Position of Women in the Workforce Today

Contrary to popular belief, women workers have made few gains in recent years despite the advent of fair employment laws and the resurgence of the feminist movement. Women are still the most expendable members of the workforce. Under-skilled, under-unionized and underpaid, they are largely powerless to force employers to recognize their needs.

1. Industrial and Occupational Segregation

Distribution of women workers has changed little since the turn of this century. Women are still concentrated in the service industries.[33/] In fact,

33/ Over the past thirty years, women have constituted about 60% of all employees in the service sector. Over 40% of all women in the labor force are employed in this industry, more than twice the rate of men workers. Waldman & McEaddy, Where Women Work - An Analysis by Industry and Occupation, U.S. Dep't of Labor, Monthly Lab. Rev. 3,12 (May, 1974) [hereinafter cited as Waldman & McEaddy].

as service occupations have increased in type and volume, so has the female labor force.[34/] But the service industries are still the least skilled,[35/] lowest paid,

34/ In 1900, women constituted only 18% of all workers. Women's Bureau, U.S. Dep't of Labor, 1969 Handbook on Women Workers 9 [hereinafter cited as 1969 Handbook]. By 1973, they were 39% of all workers. Women's Bureau, U.S. Dep't of Labor, Women Workers Today 1 (1974). The population explosion of post-World War II contributed to the need for expanding all types of services, thus generating more jobs of the types traditionally considered female. Waldman & McEaddy, supra note 33, at 3.

35/ The federal government in its Dictionary of Occupational Titles, rates the skills required to perform service jobs at the very lowest level. The Dictionary rates the following five jobs as requiring the same level of competence: Foster Mother (rears children in home as member of family), Nursery School Teacher (organizes and leads activities of pre-kindergarten children, maintains discipline), Nurse, Practical (cares for patients and children in private homes, hospitals), Rest Room Attendant (serves patrons of lavatories in stores), Offal Man, Poultry (shovels ice into chicken offal containers). U.S. Commission on Civil Rights, Women and Poverty 76 (1974) [hereinafter cited as Women & Poverty].

and least likely to be unionized. Likewise, woman's place in the factory has changed very little, and women factory workers remain concentrated in the garment, textile, tobacco and light durable goods industries where wages are lowest.[36/]

No matter what the industry, however, women work in fewer occupations than men and are clustered in those occupations at the lower end of the economic scale. Forty-three percent of all working women are in clerical or sales jobs.[37/] In government and the finance, insurance, and real estate industries, 80% of all female employees are in clerical positions.[38/] Women only recently have begun

36/ Smuts, supra note 10, at 33.

37/ Waldman & McEaddy, supra note 33, at 10.

38/ Id. 8, 9.

to gain access to the skilled trades. For the first sixty years of this century women held between 2% and 3% of all skilled jobs. By 1970, this percentage had increased to only 5%.[39/]

Women workers in professional and technical groups are occupationally more disadvantaged than they were 30 years ago. In 1940 women held 45% of all professional and technical jobs; in 1970 the percentage had dropped to 38%.[40/] Women professional and technical workers are concentrated in the education and health sectors of the economy, where they constitute a majority of the total number of employees. But even where women dominate an occupation, they are

39/ Hedges & Bemis, Sex Stereotyping: Its Decline in Skilled Trades, U.S. Dep't of Labor, Monthly Lab. Rev. 14 (May, 1974).

40/ 1 Labor Pains 10 (1975) (published quarterly by Working Women United Institute, Ithaca, N.Y.).

still denied the top positions. For example, in the 1970's women hold 60% of all jobs in education.[41] They are 85% of elementary school teachers[42] and 70% of elementary and high school teachers combined,[43] but are only 28.4% of college presidents, professors and instructors.[44] In the health sector women hold 75% of all jobs,[45] but constitute only 12-1/2% of physicians.[46] They constitute almost all nurses, however.[47]

41/ Waldman & McEaddy, supra note 33, at 3.

42/ Blitz, Women in the Professions, 1870-1970, U.S. Dep't of Labor, Monthly Lab. Rev. 34, 35 (May,1974).

43/ Waldman & McEaddy, supra note 33, at 7.

44/ Blitz, supra note 42, at 37.

45/ Waldman & McEaddy, supra note 33 at 3.

46/ Id. 9.

47/ Blitz, supra note 42, at 35.

2. Unemployment

Because women, more than men, are likely to be marginally employed, the specter of unemployment looms very large for them.[48] In the first quarter of 1973, 24% more women than men were unemployed.[49] The unemployment rate for women

48/ "[W]omen are more likely than men to work for marginal businesses characterized by small size, low capital investment, low profit margins, haphazard personnel practices, high employee turnover, and low pay. Many thousands of women still work in such plants, making cheap clothing, costume jewelry, paper hats and party favors, inexpensive toys, picture frames, knickknacks, and similar products. Sometimes ignored by government and union alike, these are the plants where conditions are most likely to be reminiscent of the last century, even to the crudely lettered 'Operators Wanted' sign on the door. Usually located in old buildings in run-down neighborhoods, they draw upon the least educated and neediest portion of the labor supply: Puerto Ricans, Negroes, Mexicans, and poor white migrants from the rural South." Smuts, supra note 10, at 105.

49/ Despite the large size of this spread, the actual unemployment rate for women is believed to be still higher. In 1973 economist Barbara R. Bergmann reported that if the unemployment rate were adjusted to include

[footnote continued]

is inflated by sex discrimination in employment.[50] Being limited to many fewer occupations than men, they have fewer options when times are hard.

[footnote 49 continued]

discouraged women who had stopped looking for work, although they still wanted work, women's unemployment rate would be 35% higher than men's. Bergmann notes that this 35% figure does not reflect the number of women who have opted for public assistance or who respond that they are housewives rather than admit to their unemployment. Hearings Before the Joint Economic Comm. on The Economic Problems of Women, 93rd Cong., 1st Sess., pt. 1, at 70 (1973) [hereinafter cited as Economic Hearings]. Of the one million persons who have stopped looking for work out of discouragement, women number 70%. 1 Labor Pains supra note 40, at 10.

50/ "The demand for women's labor is kept artificially low because of their virtual exclusion from certain fields . . . and the supply of women to the few fields where they are welcomed is artificially increased thereby.

. . . .

" . . . We have a situation where a relative undersupply of men and a relative oversupply of women averages out to a high overall unemployment rate. The correct policy is . . . the enforcement of measures which encourage employers to relieve the scarcity of men by employing women in jobs for which they have previously not been considered." Economic Hearings, supra note 49, at 54-55.

3. Unionization

Unions by and large have continued their indifferent response to the needs of female workers. They still have avoided organizing the low-wage, low-skill jobs where women are concentrated. In the 1960's, although 37% of the workforce was female, women comprised less than 20% of union members. Only 14% of women workers were unionized as compared with 25% of men. Where women have been organized, they are concentrated in a few large unions. Among 190 unions participating in a 1966 U.S. Department of Labor survey, in only four unions did women constitute at least 80% of the membership; in only 26 unions did women constitute at least 50% of the membership. In 107 unions, however, women's membership was less than 10%.[51] While

51/ 1969 Handbook, supra note 34, at 9, 82.

the number of women union members has been increasing, it has not kept pace with the rate of increase of women in the overall labor force so that the ratio of women union members to employed women actually has declined over the past fifteen years. Moreover, even where women are unionized, they tend to be represented at the bargaining table and elsewhere by men. Women hold very few of the top union jobs, whether they are appointive or elective positions. Of the "top leadership and staff positions reported in the 1971 BLS Directory, women hold only 70 posts in 47 of the 208 unions and employee associations."[52/]

Because they have been excluded from positions of power in the labor movement, and because they often have been excluded from union membership altogether, women

52/ B.M Wertheimer & A.H. Nelson, Trade Union Women 7, 9 (1975).

workers have been deprived of the one meaningful mechanism for asserting their rights against their employers: strong and effective unionization. Women's demands are often the first things traded away at the bargaining table. In lawsuits involving sex discrimination issues, unions tend to take the management position. In fact, it appears that unions are paying less attention to the special problems of women than they were sixty years ago.[53/] Under these circumstances, it is no wonder that women as a group continue to be the most underpaid and exploited members of the workforce.

53/ Raphael, Working Women and Their Membership in Labor Unions, U.S. Dep't of Labor, Monthly Lab. Rev. 27, 32 (May, 1974).

4. Earnings Gap

The annual wage for women has never been more than two-thirds the average annual wage for men for any year in which statistics have been collected. In 1939, full-time women workers earned 60.8% of men's annual earnings.[54/] By 1955, the percentage had increased by only 3.1 points.

Today, despite the advent of fair employment laws and the growth of the women's rights movement, women have actually lost ground. According to the most recent census data, the earnings gap between men and women is widening rather than narrowing. In 1955 the average full-time year-round woman worker earned 63.9% as much as the average man; in 1970 she earned only 59.4%

54/ 1969 Handbook, supra note 34, at 137.

as much.[55/] The number of poor families headed by women has increased by 33% in the last decade.[56/]

Area wage surveys covering six industry divisions recently published by the Bureau of Labor Statistics indicate that on a nationwide basis, pay levels were consistently higher for men than for women working in the same occupation.[57/] Furthermore, women's income position relative to that of men within the same industry is also deteriorating. The median wage of women clerical workers dropped from 72% of that of men in 1956 to 67% of men in 1966; that of women operatives, from 62% in 1956 to 56% in 1966; and that of women sales workers

55/ Women's Bureau, U.S. Dep't of Labor, Fact Sheet on the Earnings Gap (undated).

56/ Women & Poverty, supra note 35, at 25.

57/ Waldman & McEaddy, supra note 33, at 11.

from 45% in 1956 to 41% in 1966. Income of women managers, officials and proprietors also declined in relation to that of men, from 64% in 1957 to 54% in 1966.[58] For the fiscal year 1974, ten years after the passage of the Equal Pay Act, the Labor Department found nearly 33,000 employees to be underpaid by more than $20.6 million.[59]

For those women who work in female-intensive industries, the picture is even more bleak. Most industries paying less than $100 a week are female-intensive. Male-intensive industries, on the other hand, are on a higher rung of the wage ladder where earnings average well over the $138 per week average for all workers.[60] In retail sales, for example,

58/ 1969 Handbook, supra note 34, at 134.

59/ Citizens' Advisory Council on the Status of Women, Women in 1974, at 7 (1975).

60/ Waldman & McEaddy, supra note 33, at 10.

where over 60% of employees are women[61] the average weekly wage in the sales of general merchandise is $82. Motor vehicle dealers, who include only 11% women, earn $152. Service industries which employ 60% women pay an average of $111 per week. The industries manufacturing transportation equipment and malt liquids, where the average weekly wages are $210 and $229, respectively, employ less than 10% women.[62]

The popular myth that education is the key to financial security is even less true for women than for other groups. The appalling fact is that women workers receive 30-40% less pay than men with the same or even less education.[63] Women of all races are paid less than

61/ 1969 Handbook, supra note 34, at 90.

62/ Waldman & McEaddy, supra note 33, at 10-11.

63/ Economic Hearings, supra note 49, at 54.

men of any race. For example, white women with a college degree earn less than nonwhite men with a high school degree. In 1966, the median annual income of non-white male high school graduates was $5,188; women college graduates earned only $4,165.[64/]

For women, the prospects for advancement and an increase in earnings are not good. Only 1.1% of working women earn over $15,000 per annum, compared to 13.5% of men. Of the 5.05 million jobs in the $15,000 per annum category, only 3% were held by women in 1970.[65/] Economist Robert Hall finds the picture a grim one:

64/ 1969 Handbook, supra note 34, at 141.

65/ K. Decrow, Sexist Justice 99 (1974).

> [T]he only group in our economy who continue to get higher earnings beyond the middle-twenties ages are white men: i.e., black men and all women have essentially no gains in pay or status to look forward to with age.[66/]

5. Fringe Benefits

Besides being segregated into dead-end jobs and short-changed in salary, women workers are treated unequally in terms of fringe benefits.

Private pension systems, for example, are increasingly under fire as discriminatory to women.[67/] A threshold problem is that the low-paying industries in which women typically work often do not offer pension benefits to their employees at all. Only 36% of working women, as

66/ Economic Hearings, supra note 49, at 61.

67/ See, e.g., Manhart v. Department of Water & Power, 10 FEP Cases 101 (C.D. Cal. 1975); Decision of EEOC 74-118, CCH Emp. Prac. Guide, ¶6431 (April 26, 1974).

compared with 52% of working men, are covered by such plans.[68/]

But the disparity in fringe benefits that affects women most seriously is the differential treatment they receive in connection with their childbearing functions. Sick leave policies, medical insurance plans and disability insurance plans all single out pregnancy for special treatment. Pregnancy coverage is either denied or severely limited, while male employees receive a full range of benefits for conditions which affect them.

Until shortly after the turn of this century, there was no such thing as maternity leave for disabilities resulting from pregnancy and childbirth. When a woman worker became obviously pregnant, she was summarily dismissed. In 1915

68/ Women & Poverty, supra note 35, at 118-19.

the New York State Commission of Education rendered a precedent-setting decision which allowed married women teachers an unpaid "maternity leave" as an alternative to resignation.[69/] Private employers eventually followed suit, but progress has been slow. Today the conditions surrounding maternity leaves for women workers are characterized by their arbitrariness and inconsistency. Employers variously allow a woman employee a voluntary "leave" -- with no guarantee of a job on her return or retention of her seniority -- or force her to take a mandatory leave of absence at an arbitrarily decreed stage of pregnancy.[70/] Frequently employers require a doctor's

69/ T. Hayden, Punishing Pregnancy: Discrimination in Education, Employment, and Credit 36 (ACLU Women's Rights Project Report 1973).

70/ Such a policy was successfully challenged on constitutional grounds in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

certification before they will allow a pregnant woman to work beyond a certain stage of her pregnancy.

Whether leave for pregnancy is voluntary or required, however, a key fact must be borne in mind -- it is almost always an unpaid leave.[71/] Even where an employer has paid sick leave, compensatory time and/or vacation policies, female employees are usually prohibited from taking their accrued leave days

71/ Even when a woman is fired outright when pregnant she usually is ineligible for unemployment compensation. "As of January, 1973 the District of Columbia and 35 states treated pregnant women differently from other unemployed individuals in the distribution of unemployment compensation (U.S. Dept. of Labor Manpower Administration, Unemployment Insurance Service, Comparison of State Unemployment Insurance Laws, Comparison Revision No. 2, 4-46 (January 7, 1973), update of U.S. Dept. of Labor, Bureau of Employment Security, BES No. U-141, Comparison of State Unemployment Insurance Laws, 1970)" Peratis & Rindskopf, Pregnancy Discrimination As a Sex Discrimination Issue, ___ Women's Rights L.Rptr. ___ n.2 (1975) (to be published).

for purposes related to pregnancy. Such a policy has many harsh results. In many companies the accumulation of seniority, pension benefits, and related benefits, while unaffected by paid leaves of absence, is frozen during unpaid leaves of absence. Thus when a woman takes a leave of absence for pregnancy she loses valuable employee rights which men do not lose when they take a leave of absence for virtually any other purpose.

Moreover, health insurance policies provided by employers almost never cover the costs of pregnancy and childbirth to the same extent as other medical conditions. Basic coverage of doctors' fees and hospital costs is usually limited to a specific dollar amount and maternity expenses are most often the only category singled out for such limitation. Major

medical coverage almost always excludes any expenses attributable to normal pregnancy. The minimal coverage available for normal maternity -- and complications thereof -- is usually available only under a family plan (i.e., the female employee must opt for more expensive coverage since reserves for maternity are usually accumulated only from the family plan premium). Benefits are usually payable only for pregnancies that begin after the effective date of coverage, and, ironically, the wives of male employees may get more complete coverage than female employees themselves.[72/]

And, finally, disability insurance plans, offered by employers, which pay income to disabled employees while they

---

72/ See Insurance Commissioner's Advisory Task Force on Women's Insurance Problems, Pennsylvania Insurance Dep't, Final Report and Recommendations 9-17 (1974).

are incapacitated, almost always exclude or limit coverage for pregnancy-related disabilities. In the case at issue here, the Liberty Mutual plan not only excludes coverage for disabilities connected with a normal pregnancy; it also excludes coverage for complications of pregnancy; and for any disability, totally unrelated to pregnancy, which a woman happens to suffer while she is pregnant.

The net result of all these policies, standard operating procedure in many companies, is that when a working woman becomes pregnant her employment is summarily disrupted and she loses income at a time when her financial needs are greatest. To make matters even more difficult, if she is fired, she cannot collect unemployment compensation. If she is forced on unpaid leave she loses seniority and pension benefits. If she is covered for

maternity by a health insurance plan, she is reimbursed for only a small portion of her childbirth expenses. For the period she is disabled, she is unable to qualify for disability insurance. Since the vast majority of women work to support themselves and their families, just a men do,[73/] this differential treatment works an untold hardship in terms of the immediate financial loss alone. Even more importantly, pregnancy policies which reinforce the societal attitude that a woman's work and income-

---

73/ "Of the nearly 34 million women in the labor force in March 1973, nearly half were working because of pressing economic need. They were either single, widowed, divorced, or separated or had husbands whose incomes were less than $3,000 a year. Another 4.7 million had husbands with incomes between $3,000 and $7,000."

An income of $7,000 per year does not meet the criteria established by the Bureau of Labor statistics for even a low standard of living for an urban family of four. Women's Bureau, U.S. Dep't of Labor, The Myth and the Reality 1 & n.1 (May, 1974).

producing ability are less important than a man's, create a self-perpetuating cycle. The result is that every time a woman worker gives birth to a child, her work history is disrupted. When she returns to the labor force after childbirth, as most women do, she is forced to begin all over again to accumulate job and seniority rights and benefits and to re-establish her employment identity.

III

TITLE VII PROHIBITS PREGNANCY DISCRIMINATION BY EMPLOYERS, REGARDLESS OF HOW A PREGNANCY EXCLUSION IS TREATED OUTSIDE THE EMPLOYMENT CONTEXT IN A SOCIAL WELFARE PROGRAM ENACTED BY A STATE LEGISLATURE.

The Equal Employment Opportunity Commission ("EEOC"), as the agency charged with the responsibility of administering Title VII, has the authority to issue guidelines indicating what are or are

not proscribed discriminatory practices:

> Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow.

Rogers v. Equal Employment Opportunity Commission, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

The Commission, drawing on its expertise in the area, has issued guidelines prohibiting employers from discriminating on the basis of pregnancy.[74/] These

---

74/ The guidelines, 29 C.F.R. §1604.10 (1974) read as follows:

"Employment Policies Relating to Pregnancy and Childbirth.

"(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion,

[footnote continued]

guidelines are entitled to great deference. Albemarle Paper Co. v. Moody, 43 U.S.L.W. 4880, 4888 (U.S., June 25, 1975); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971)

[footnote 74 continued]

> childbirth and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

"(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."

(Marshall, J., concurring). Indeed, the courts have declined to follow EEOC guidelines only when there has been a clear congressional policy indicating that the agency's interpretation of the statute was incorrect.[75/] With respect to the EEOC's pregnancy guidelines, not only is there no congressional policy to the contrary, in recent weeks Congress has explicitly approved the guidelines, almost word-for-word, in regulations promulgated pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 et seq. (Supp. III, 1973).[76/] Moreover, the

---

75/ See Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973). (EEOC guidelines providing that discrimination against aliens was discrimination on the basis of national origin conflicted with other federal legislation requiring United States citizenship as a condition of federal employment.)

76/ These regulations, published on June 4, 1975, by the U.S. Department of Health, Education and Welfare, provide that educational institutions receiving federal funds treat pregnancy disabilities suffered by their employees on the same basis they treat all other temporary

[footnote continued]

pregnancy guidelines have now been upheld by numerous federal district courts and by every appellate court which has considered the question. To date, there are six Circuit Court decisions approving the guildelines.[77/]

The company argues, however, that this Court's decision in Geduldig v. Aiello,

[footnote 76/continued]

disabilities. The regulations were studied by Congress for a forty-five day period during which they received considerable public and congressional attention. The fact that the guidelines now have been approved clearly indicates congressional support for the EEOC position. 40 Fed. Reg. 24128, 24144 (1975). See also, The Washington Post, July 10, 1975, at A7, col. ; The Washington Star, June 5, 1975, editorial page, col. .

77/ Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975); Gilbert v. General Elec. Co., 10 FEP Cases 1201 (4th Cir. 1975); Communications Workers of America v. American Tel. & Tel. Co., 513 F.2d 1024 (2d Cir. 1975); Satty v. Nashville Gas Co., 11 FEP Cases 1 (6th Cir. 1975); Holthaus v. Compton & Sons, Inc., 514 F.2d 651 (5th Cir. 1975); Hutchison v. Lake Oswego School Dist., No. 74-3181 (9th Cir., July 21, 1975), aff'g 374 F.Supp. 1056 (D. Ore. 1974).

417 U.S. 484 (1974), invalidates the guidelines and in effect establishes the proposition that pregnancy discrimination is not sex discrimination under either the Fourteenth Amendment or Title VII. This position has no merit.

In its decision in Geduldig, this Court did not find that discrimination based on pregnancy was not sex discrimination. What the Court did hold was that California's exclusion of pregnancy benefits from its disability program was not sex discrimination of the precise kind involved in Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973).[78/] Reed and Frontiero

78/ "[T]his case is thus a far cry from cases like Reed v. Reed, 404 U.S. 71, and Frontiero v. Richardson, 411 U.S. 677, involving discrimination based upon gender as such. . . . While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those
[footnote continued]

both involved statutes which discriminated on the basis of gender itself. In Reed, the Court struck down a state law which set an automatic preference for males to serve as administrators of estates. In Frontiero, the Court dealt with a federal law requiring female military personnel to meet special dependency tests males were not required to meet in order to qualify their spouses for benefits. Pregnancy discrimination is not discrimiantion of precisely this kind, for it is based not on the fact of sex itself but on a sex-linked characteristic,

[footnote 78/continued]
considered in Reed, supra, and Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." (emphasis added). Geduldig v. Aiello, 417 U.S. 484, n. 20 (1974).

pregnancy. In Geduldig, a majority of this Court found only that such discrimination was not sufficiently invidious and overt to justify setting aside a state statute, where the question was whether the state could constitutionally exclude pregnancy benefits from its state disability program.

But however discrimination on account of pregnancy fares in a non-employment context under the Fourteenth Amendment, it clearly is in violation of Title VII's proscription against sex discrimination in employment. Title VII is not directed toward the public policy judgments of state legislatures, but toward the internal employment practices of employers. When employment practices disproportionately disadvantage a class of employees protected by Title VII, as the pregnancy policy does here, they

violate the Act regardless of what constitutional standards might be applied in a non-Title VII case.[79/]

Pregnancy discrimination, as noted above, is the ultimate form of sex discrimination in employment. Employment policies which single out pregnancy disabilities for special, negative treatment inevitably injure large numbers of women workers, for so long as the human race continues to propagate itself, women will continue to become pregnant. Such policies unnecessarily interrupt the individual work history of females in the labor force and create artificial

---

79/ Numerous other policies have survived constitutional attack only to be found illegal in the employment context. E.g., with respect to differential payments based on sex, compare Kahn v. Shevin, 416 U.S. 351 (1974) (State of Florida may allow a tax exemption to widows but not to widowers) with Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (Equal Pay Act, 29 U.S.C. §206(d) (1970) requires employer to pay females on day shift as much base pay as males on night shift). Cf. also, West

[footnote continued]

barriers to their advancement in employment. As such, they are precisely the kinds of discriminatory practices Title VII was designed to eliminate.

IV

ANY INCREASED EXPENSE OF PROVIDING PREGNANCY DISABILITY BENEFITS IS NOT A JUSTIFICATION FOR DENYING THEM.

Providing fringe benefits of any kind costs an employer money, and providing an income protection plan covering pregnancy disabilities is no exception. Without question, an employer may choose to withhold or limit such benefits for all his employees, for reasons of cost, without violating Title VII. But when an employer provides a complete package of

[footnote 79/ continued]

Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) with Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969), for differing judicial treatment of state protective labor laws.

benefits covering every disability except one, which affects only women, then the policy inevitably has a sex-discriminatory impact.

Liberty Mutual's income protection plan provides benefits for virtually every disability requiring the care of a doctor, except disabilities relating to pregnancy. Many of the conditions covered are serious conditions involving long periods of disability and resulting in high costs to the company. Coronary heart disease and emphysema are two of the most serious, and both of these conditions have a much higher incidence among men than women.[80/]

80/ The rates of coronary heart disease for different age groups of men and women are as follows:

	All ages	under 45	45-64	65 & Over
	(Rate per 1,000 population)			
Men	19.0	1.6	48.1	95.7
Women	13.6	0.8	22.6	75.7

Public Health Service, U.S. Dep't HEW, Prevalence of Chronic Circulatory Conditions United States, 1972, No. (HRA) 75-1521, Series 10-No. 94, at 23, Table 3 (1974).

BEST COPY AVAILABLE

Men in the general population are disabled by these diseases approximately one and one-half times as much in any one year as

---

[footnote 80/ continued]

The number of men under 65 experiencing coronary heart disease is proportionately much greater than that of women. For men and women under 45, men had twice as high an incidence as women; for men and women between ages 45 and 64, men had 2.12 times the incidence in women. The overall figure (19.0 for men compared with 13.6 for women), therefore, is deceptive, since it includes people over age 65, who are not part of the workforce. In a population of working age (under age 65), men therefore would have an even higher rate of incidence of coronary heart disease over women than the overall figures indicate.

The rates of emphysema for different age groups of men and women are as follows:

	All ages	under 45	45-64	65 & Over
	(Rate per 1,000 population)			
Men	10.3	1.2	22.1	58.8
Women	3.1	0.8	6.5	11.6

Public Health Service, U.S. Dep't HEW, Prevalence of Selected Chronic Respiratory Conditions, United States-1970, No. (HRA) 74-1511, Series 10-No. 84, at 16, Table 2 (1974).

women are disabled by the same conditions.[81/] Liberty Mutual's plan also covers disabilities due to ulcers, prostatectomies, hernias and gout, which, while they do not normally involve prolonged periods of disability, are conditions which primarily or exclusively

---

81/ Using a population of 1,000, the 13.6 women who are disabled by coronary heart disease in a single year are disabled for an aggregate total of 292.57 days. The 19 men who are disabled are incapacitated for a total of 408.74 days. These estimates were obtained by multiplying the number of persons disabled by coronary heart disease in each sex by the number of bed disability days for coronary heart disease each group experiences during the year. Prevalence of Chronic Circulatory Conditions, supra note 80 at 7, Table C. The disability days for emphysema are: 3.1 women disabled for an aggregate total of 11.25 days; 10.3 men disabled for an aggregate total of 37.37 days. Prevalence of Selected Chronic Respiratory Conditions, supra note 80, at 6, Table C.

The totals for the two conditions are: women disabled for 303.82 days per year; men disabled for 446.11 days per year.

affect men.[82] The plan also covers alcoholism which, by the company's own admission, is twice as likely to affect men as women.[83]

82/ The incidence of these conditions is as follows:

	Ulcers	Prostatectomy	Hernia	Gout
	(Rate per 1,000 population)			
Men	22.0	-	20.9	6.9
Women	12.6	-	12.0	2.9

From: Public Health Service, U.S. Dep't HEW, Prevalence of Selected Chronic Digestive Conditions, United States - July-December 1968, No. (HRA, 74-1510, Series 10-No. 83, at 18, Table 2 and 19, Table 3 (1973); Public Health Service, U.S. Dep't HEW, Prevalence of Chronic Skin and Musculoskeletal Conditions, United States-1969, No. (HRA) 75-1519, Series 10-No. 92, at 36, Table 17 (1974).

83/ Brief for Petitioner at 20. The company says in its brief that alcoholism is not covered by the plan. This is a misstatement of fact. Like every other condition which the plan covers, disabilities due to alcoholism are compensable if the disabled employee is under medical care.

In seeking ways to reduce costs the company has not chosen to eliminate or limit any benefits for the foregoing conditions. Nor has it sought to limit benefits across the board for conditions affecting men and women equally. Instead, the company has chosen to eliminate a benefit which affects only women and which -- because of women's dual role as wage-earner and child-bearer -- affects women profoundly.

This decision reflects, once again, the underlying political realities in this case: regardless of cost, employers do in fact accommodate themselves to meet the special needs of male employees. They do not do so for female employees because women are viewed as an expendable source of cheap labor, a group that is willing to work for low wages and inadequate benefits because -- thanks

to nationwide patterns of discrimination -- other, better jobs simply are not available. In the words of one expert, writing in 1929, "The woman is nearly always the cheap or marginal worker, and . . . she is expected by the public and employer to remain one."[84/]

Liberty Mutual, of course, is a company which has taken advantage of its female employees in many ways. Until women challenged its practices, the company sex-segregated its jobs and paid female "claims representatives" less than it paid male "claims adjusters" for doing the same work. The company would

84/ Statement of Alice Rogers Hagar, quoted in Chafe, supra note 12, at 65. As economics expert Professor Paul A. Samuelson has more recently observed, for the employer, sex discrimination is profitable. In congressional hearings on the subject, he questioned whether an unconscious realization of this fact has not reinforced prejudice on the part of employers who stand to reap extra profits from hiring low-cost women. Economic Hearings, supra note 49, at 62-64.

not allow women to transfer to the higher-paying position, nor would it promote female employees to any but a limited number of supervisory positions in the claims department. The statistical evidence of discrimination was overwhelming.[85/] Witholding benefits for pregnancy is Liberty Mutual's last form of resistance to the idea that it must treat its male and female employees equally.

But whatever the political realities may be, as a legal matter, under Title VII cost is not a defense to this type of discrimination. First, a policy of this kind, which cannot ever have a negative impact on male workers, either singly or as a group, is overtly discriminatory against women. As such, it is not the

85/ See 372 F.Supp. at 1149-51; 508 F.2d at 257-58.

kind of facially neutral policy to which cost, or any other business purpose rationale, may ever be a defense. Liberty Mutual may not exclude benefits for a condition unique to women, any more than it may exclude benefits for a condition virtually unique to blacks, such as sickle-cell anemia, merely because including such benefits costs money. As EEOC guidelines provide, and as the appellate court noted, cost is simply not a defense to this action.[86/]

Moreover, even if cost could be asserted as a legal defense in this case, Liberty Mutual has not met its heavy burden of proof to show that there are no other

---

86/ 511 F.2d at 206, citing 29 C.F.R. §1604.9(e) (1974), which provides that;

> "It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other."

less discriminatory ways of reducing expenses.[87/] Here, on the contrary, there are numerous alternatives to a policy penalizing pregnant women, ranging from a general reduction of benefits to a limitation on some of the kinds of coverage which, at present, disproportionately benefit men.

And, finally, Liberty Mutual has not only failed to meet its burden of proof on this issue; it has failed to offer any evidence whatsoever of what its costs might be. Instead, the company has relied on general statistics and, in particular, on briefs written by other parties in other cases. Surely as an insurance company whose daily business it is to

---

87/ As already noted, the courts have construed the business necessity defense narrowly, supra note 3. Cost has specifically been rejected as a consideration which, by itself, justifies discrimination. Robinson v. Lorillard Corp., 444 F.2d 791, 799, n.8 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971).

estimate the costs of insurance coverage of this kind, Liberty Mutual should have been in a position to present data justifying its pregnancy policy for its own employees if such data exists. Since this evidence was not presented, this Court should dismiss the company's hypothetical cost arguments out of hand.

CONCLUSION

In the last analysis, this case presents the timeless problem of a powerless labor group being relegated to second-class economic status by an employer's policies. Women have historically been denied equal wages and equal job opportunity; and they have been locked even further into this inferior position by employment policies which penalize them for their unique biological role as child-bearer. Liberty Mutual's refusal to provide disability benefits for pregnancy-related disabilities on the same terms that it provides disability benefits for all other conditions is sex discrimination in its

purest form. This Court should affirm the Third Circuit decision and add its voice to the prevailing view that such policies violate Title VII of the 1964 Civil Rights Act.

Respectfully submitted,

Diane Serafin Blank
Nancy E. Stanley

BLANK GOODMAN KELLY
RONE & STANLEY
36 West 44th Street
New York, N.Y 10036
(212) 869-0020

Attorneys for Blank
Goodman Kelly Rone
& Stanley as Amicus
Curiae

September 1975

Attorneys for Amicus gratefully acknowledge the assistance provided in the preparation of this brief by Marguerite R. Greenfield, third-year law student at Northeastern University School of Law, Boston, Massachusetts; Barbara Ann Frouman, third-year law student at Hofstra University School of Law, Hempstead, New York; and Ellen Wertheimer, Yale '75.

Supreme Court, U. S.
FILED
SEP 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
PETITIONER,

vs.

SANDRA WETZEL and MARI ROSS, on behalf of Themselves and All Others Similarly Situated,
RESPONDENTS,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF OHIO

WILLIAM J. BROWN
Ohio Attorney General

ANDREW J. RUZICHO
EARL M. MANZ

Ohio Assistant Attorneys General

State Office Tower
Columbus, Ohio 43215

Attorneys for the State
of Ohio, Amicus Curiae

OF COUNSEL:
ELIZABETH BARINGHAUS

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1480

TABLE OF CONTENTS

	Page
INTEREST OF STATE OF OHIO AS AMICUS CURIAE	1
OPINIONS BELOW	2
JURISDICTIONAL STATEMENT	2
STATUTE INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. LIBERTY MUTUAL'S FAILURE TO COVER DISABILITY DUE TO PREGNANCY IS UNLAWFUL SEX DISCRIMINATION IN VIOLATION OF TITLE VII	8
II. LIBERTY MUTUAL HAS NOT OVERCOME THE SEXUAL IMPACT OF ITS POLICY BY REASONS OF BUSINESS NECESSITY	14
III. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PROHIBITS ALL SEX DISCRIMINATION IN CONDITIONS OF EMPLOYMENT AND MAKES UNLAWFUL SEX DISCRIMINATION WHICH MAY NOT BE UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT	18
CONCLUSION	23

TABLE OF AUTHORITIES

Cases: Page

Addabbo v. *Donovan*, 16 N.Y.2d 619, 261 N.Y.S.2d 68, 209 N.E.2d 112 (1965), *cert. denied*, 382 U.S. 905 (1965) 20

Bartmess v. *Drewrys, U.S.A., Inc.*, 444 F.2d 1186 (7th Cir. 1971) 9

Bowe v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969) 9

Communications Workers v. *American Telephone & Telegraph Co.*, 513 F.2d 1024 (2d Cir. 1975), *petition for cert. filed*, 43 U.S.L.W. 3684 (June 19, 1975), *reversing* 379 F.Supp. 679 (S.D.N.Y. 1974) .. 21

Davis v. *American National Bank of Terrell, Texas*, Civ. Case No. CA3-4512 (N.D. Tex. 1971) 13

Espinoza v. *Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973) 14

Geduldig v. *Aiello*, 417 U.S. 484 (1974) .. 7, 18, 19, 22

Gilbert v. *General Electric Co.*, 375 F.Supp. 367 (E.D. Va. 1974), *petitions for cert. before judgment filed*, 43 U.S.L.W. 3675 (U.S. June 17, 1975) (Nos. 74-1589 and 74-1590), *affirmed* — F.2d —, 10 F.E.P. Cases 1201 (4th Cir., June 27, 1975) 21

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 8, 14, 15

Guinn v. *United States*, 238 U.S. 347 (1915) 12

Holthaus v. *Compton & Sons*, — F.2d —, 10 F.E.P. Cases 601 (8th Cir. 1975) 21

Page

Johnson v. *Pike Corporation of America*, 332 F.Supp. 490 (D.C. Calif. 1971) 13, 17

Jones v. *Lee-Way Motor Freight*, 431 F.2d 245 (10th Cir. 1970) 15

Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 19

Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. *United States*, 416 F.2d 980 (5th Cir. 1969) 15

Myers v. *Anderson*, 238 U.S. 368 (1915) 12

Offerman v. *Nitkowski*, 378 F.2d 22 (2d Cir. 1967) .. 20

Phillips v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971) 9, 14

Porcelli v. *Titus*, 431 F.2d 1254 (3d Cir. 1970) 20

Robinson v. *Lorillard Corporation*, 444 F.2d 791 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1971) 15, 16, 17

Sale v. *Board of Education*, 390 F.Supp. 784 (N.D. Iowa 1975) 22

Satty v. *Nashville Gas Company*, 384 F.Supp. 765 (M.D. Tenn. 1974), *affirmed*, No. 75-1083, — F.2d — (6th Cir. Aug. 8, 1975) 14, 21

Sprogis v. *United Airlines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) 7

Swann v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971) 20

Tometz v. *Board of Education*, 39 Ill. 2d 593, 237 N.E.2d 498 (1968) 20

Page

United States v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2nd Cir. 1971) 17

United States v. *Sheet Metal Workers International Association, Local No. 36 and IBEW Local No. 1, AFL-CIO*, 416 F.2d 123 (8th Cir. 1969) 13

Vineyard v. *Hollister Elementary School District*, 64 F.R.D. 580 (N.D. Cal. 1974) 22

Weeks v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969) 9

Wetzel v. *Liberty Mutual Insurance Co.*, 511 F.2d 199 (3d Cir. 1975), *affirming* 372 F.Supp. 1146 (W.D. Pa. 1974) 9, 10, 11, 16, 21, 22

Zichy v. *City of Philadelphia*, — F.Supp. —, 10 F.E.P. Cases 853 (E.D. Pa. 1975) 21

Miscellaneous:

House Report on Equal Employment Opportunity Act of 1972, 2 U.S. Code Cong. & Admin. News 2140 (92nd Cong., 2nd Sess. 1972) 13

Waldman & Whitmore, *Children of Working Mothers, March 1973*, 97 Monthly Labor Rev. 50 (May, 1974) 12

Waldmann & McEaddy, *Where Women Work-An Analysis by Industry and Occupation*, 96 Monthly Labor Rev. 3 (1974) 12

Regulations:

29 C.F.R. § 1604.10 (b) (1972) 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY, A CORPORATION,
PETITIONER,

vs.

SANDRA WETZEL and MARI ROSS, on behalf of Themselves and All Others Similarly Situated,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF OHIO

INTEREST OF STATE OF OHIO

The laws of the State of Ohio prohibit discrimination on the basis of sex in employment. *Ohio Revised Code* § 4112.02 (A). Pursuant to this statute, the State is currently litigating several cases which may be affected by the decision in this case. For this reason, the State of Ohio, by its Attorney General, respectfully submits this brief as *amicus curiae* pursuant to Rule 42, Part IV of the Revised Rules of the Supreme Court of the United States.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 511 F.2d 199, *Wetzel, et al.* v. *Liberty Mutual Insurance Company.*

The opinion of the District Court for the Western District of Pennsylvania is reported at 372 F.Supp. 1146 (1974). The memorandum order of that court denying petitioner's Motion for Reconsideration is reported at 372 F.Supp. 1163 (1974).

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals for the Third Circuit affirming the judgment of the District Court of the Western District of Pennsylvania was entered on February 11, 1975. The petition for writ of certiorari was filed on April 2, 1975 and granted on May 27, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

Section 703 (a) (1) of Title VII of the Civil Rights Act of 1964, Act of July 2, 1964, 78 Stat. 253, 42 U.S.C. § 2000e-2 (a) (1).

QUESTION PRESENTED

Whether the adoption of a disability income protection plan which admittedly treats women different than men by excluding coverage of disabilities due to pregnancy is sex discrimination prohibited by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2 (a) (1).

STATEMENT OF FACTS

Liberty Mutual is a casualty insurance company which maintains offices throughout the country. The Company provides its employees with an extensive contributory group disability income protection plan. Subscription to this plan is mandatory for all employees and provides benefits to an employee who is absent from work for eight calendar days due to a covered disability or illness which requires the treatment of a physician.

Pregnancy-related disabilities are the only medically verifiable disabilities other than those resulting from acts of war or intentionally self-inflicted injuries which are excluded. In addition, leaves or temporary absences due to pregnancy are not covered by the plan.

Other Company policies relating to pregnancy have varied somewhat since July 2, 1965, the effective date of Title VII, but such policies have never complied with the law until the trial court's decision at 372 F.Supp. 1146 (W.D. Pa. 1974). Thus, from 1948 until March, 1967, the Company's maternity leave policy was unchanged. During that time, a pregnant employee was not permitted to work beyond her sixth month of pregnancy under any circumstances and was discharged by the Company at that time. In March, 1967, the Company modified its leave policy slightly so that a pregnant employee was discharged after her eighth month of pregnancy. The policy of automatic termination continued until September, 1970, when the Company began to grant unpaid leaves of absence as an alternative to discharge. Employees were required to take leaves of absence after the eighth month of pregnancy and to return to work no later than six months from commencement of the leave or three months from the date of delivery, whichever came first. The policy was modified in November, 1971, to enable an employee to

work for as long as her physician verified her ability to continue. The same mandatory return dates, which were uniformly applied without regard to any disabling complications which may have resulted from pregnancy or childbirth, remained in force. Thus, an employee granted a leave of absence for maternity was required to return to work on a date certain or be terminated from employment. There was no such requirement for any other disability.

The Third Circuit at 511 F.2d 199, 208 found such mandatory return dates, applied only to disability due to pregnancy, to be sex discrimination in violation of Title VII. This finding is not in issue before this Court.

Further, the Company's health insurance plan provides coverage for children of employees who are working for the Company at the time of the birth of the child, and this excludes from coverage the child of an employee who is absent on a maternity leave of absence at the time of the birth of the child. Under such a policy, natural born children of women employees would not be covered by the Company's health insurance plan, whereas natural born children of male employees would be covered under the plan.

On another level, Liberty Mutual used, until very recently, different standards for female, as opposed to male employees, in relation to recruitment, hiring, promotion and salaries. Such disparate treatment occurred due to the fact that in the Claims Department[1], an employee's original assignment determined, in effect, the employee's future chances of promotion.

Promotion to the higher rank of Claims Supervisor was limited to persons holding the position of Claims Adjuster

[1] Claims Department promotions, *etc.* are the only ones in issue here.

and until 1970, that position was limited to male employees. On the other hand, the entry level classification in the Company's Claims Department of "Claims Representative" was exclusively limited to women until 1970. There was no avenue of promotion to Claims Supervisor and higher supervisory positions for those persons classified as "Claims Representatives" on entry into the Company in its Claims Division.

There were two higher supervisory positions in the "Claims Representative" category, that of "Supervising Claims Representative" and "Claims Representative Supervisor", but no promotion beyond the second rank. Although the line of responsibility from "Claims Representative Supervisor" runs to "Claims Supervisor" there was no similar line of promotion because all "Claims Supervisors" were drawn from the ranks of "Claims Adjuster". The only educational requirement necessary in order to be hired as a "Claims Adjuster" or a "Claims Representative" was a college degree. No prior experience in the insurance business was required and, in fact, the Company did not hire persons who had worked for other companies in its entry level positions in the Claims Department.

The recruiting brochures for the position of "Claims Representative" were entirely female oriented.[2] However, the recruiting brochure used by the Company until 1970 described the position and duties of "Claims Adjusters" in an entirely male-oriented fashion. Its illustrations showed men performing the duties of the position, and bearing the legend in large type, "Are you the right man?", and recited the avenues of advancement from Claims Adjuster through the Branch Office, Claims Manager, Division

[2] Its title page carried the caption and picture identifying the position as a job fit for a queen.. It showed women in its illustrations of persons performing their duties in this capacity.

Claims Manager and so on up the ladder. Between July 1, 1965[3] and the end of 1966, 401 persons were hired for the positions of "Claims Representative", not one of which was male. Between July 1, 1965 and March 17, 1972, 2,329 persons were hired as "Claims Representatives" of which 2,302 or 98.84% were women. The first male "Claims Representative" was hired in 1969, four in 1970, and twenty in 1971. During the period from 1965 until the end of 1970, the Company hired over 2,000 "Claims Adjusters", not one of which was female.

As a result, the pay differential between the positions of "Claims Adjuster" and "Claims Representative" was substantial, being approximately $2,500 per year.

The district court noted that the Company offered no evidence of any bona fide occupational qualification to justify the complete exclusion of women from the Claims Adjuster position for over a period of five years. It held that the Company deliberately engaged in sex discrimination in hiring, promotion, salaries, and recruitment. 372 F.Supp. at 1154.

SUMMARY OF ARGUMENT

Liberty Mutual has pursued, for some time, a deliberate policy of sex discrimination in its Claims Department. Such discrimination has not only permeated its policies relating to pregnancy, but has also affected its hiring, assignment and promotion policies. Based upon these findings by the lower court, the past policies of the Company affecting women approach the brink of mere pretexts of invidious discrimination on the basis of sex.

---

[3] When the position of Claims Representative was first created.

The disability income plan adopted by the Company excludes from coverage disabilities related to pregnancy. Such a policy violates Title VII in two ways:

1. Dissimilar treatment for men and women who are similarly situated has been held unlawful under Title VII in a variety of contexts in addition to pregnancy disability benefits; and

2. While it is true that all women workers are not pregnant at any given time, women in the labor force are susceptible to becoming pregnant. It is not necessary that all women be adversely affected by the policy in issue; it is only necessary that women are affected by the policy at a differential rate than men in order to trigger Title VII review.

Where a policy is demonstrated to have discriminatory effects, it can only be justified by reasons of a business necessity to negate the illegal effect. Because the petitioner did not adduce any evidence to justify the policy as a business necessity, the application of this rule is unnecessary in this case.

Finally, it is essential in this case to keep the issue in focus: the question is not whether the Equal Protection Clause of the Fourteenth Amendment requires inclusion of disabilities relating to pregnancy within a disability insurance program, but whether Title VII of the Civil Rights Act of 1964 requires such inclusion. Reliance by petitioners on *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) is misplaced because the case at bar concerns statutory interpretation rather than constitutional analysis found in *Aiello*.

Title VII of the Civil Rights Act of 1964 makes unlawful as sex discrimination, petitioner's exclusion of pregnancy disabilities from its disability insurance program even

though a similar insurance program of a government body might not be violative of the Equal Protection Clause of the Fourteenth Amendment.

The Constitution does not set outside limits on what discriminatory acts may be made unlawful. Rather, it sets lower limits on what discriminatory acts are unconstitutional and cannot be made lawful. Thus, while Congress cannot make lawful those actions forbidden by the Fourteenth Amendment, Congress can make unlawful, actions which are not violative of the Fourteenth Amendment itself.

ARGUMENT

I. LIBERTY MUTUAL'S FAILURE TO COVER DISABILITY DUE TO PREGNANCY IS UNLAWFUL SEX DISCRIMINATION IN VIOLATION OF TITLE VII.

The decision of this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) makes it clear that, under Title VII, "what is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 431. Providing a male employee disabled from heart disease or prostate surgery, with insurance benefits, but denying a female employee, disabled from pregnancy, those same benefits is certainly arbitrary. It is also unlawful due to the disparate effect which such a policy has on women employees.

Dissimilar treatment for men and women who are similarly situated has been held unlawful under Title VII in

a variety of contexts in addition to pregnancy disability benefits. *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971) (held that company could not exclude women with pre-school age children from employment opportunities unless they also exclude men with pre-school age children); *Sprogis* v. *United Airlines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) (held that it was illegal to apply "no marriage" rule solely to stewardesses and not to male employees and that this regulation could not be justified as a BFOQ because of customer preference); *Bartmess* v. *Drewrys, U.S.A., Inc.*, 444 F.2d 1186 (7th Cir. 1971) (discrimination with regard to "fringe benefits" such as retirement plans which set different compulsory ages for retirement for men and women are prohibited by Title VII); *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969) (held that refusal to consider or hire women for jobs as switchmen was unlawful). *See also Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).

Under either the "adverse impact" or the "disparate effect" test, Liberty Mutual's policy of excluding disability due to pregnancy from its wage continuation plan is sex discrimination.

Initially, a consideration of the background in which this case arises is necessary in order to fully understand the policy at issue. The past policies of the Company affecting women approach the brink of mere pretexts of invidious discrimination on the basis of sex. As the District Court found, Liberty Mutual has pursued for some time, a deliberate policy of sex discrimination throughout its Claims Department. *Wetzel* v. *Liberty Mutual Insurance Co.*, 372 F.Supp. 1146, 1154 (W.D. Pa. 1974). Thus, men were hired into the Department as "Claims Adjusters" with opportunities to reach the highest level of management. In contrast, women, until 1972, made up 98.84%

of those hired as "Claims Representatives", who, by definition, were unable to rise higher than two ranks beyond the level of their initial assignment in the Department. Until 1970, no woman in the Claims Department advanced beyond those specified ranks. *Wetzel* v. *Liberty Mutual Insurance Co.*, 372 F.Supp. at 1154. Discrimination in hiring, therefore led, in turn, to sex discrimination in the area of salaries and promotions.

Liberty Mutual offered no evidence at the trial court level of any bona fide occupational qualification to justify the complete exclusion of women from the position of "Claims Adjuster" through which promotions were possible. *Wetzel* v. *Liberty Mutual Insurance Co.*, 372 F.Supp. at 1154. Further, Liberty Mutual is not contesting the lower court's determination that it practiced discrimination on the basis of sex in the areas of recruitment, hiring, salaries and promotions. Rather, the Company's appeal is limited to the issue of whether failure to cover disability due to pregnancy is violative of Title VII.

In regard to pregnancy, which uniquely affects women, Liberty Mutual has, as in its other employment practices, acted in a discriminatory fashion. Until March, 1967, the Company's policy was to terminate the employment of a pregnant employee at the end of her sixth month of pregnancy. Thereafter, until September, 1970, the policy was to terminate an employee after the eighth month of pregnancy. An employee so terminated could be re-employed, at the sole discretion of the Company, if she re-applied for employment after the birth of her child and if there was a position available. In September, 1970, Company policy was again changed to require pregnant employees either to terminate employment or take a leave of absence at the end of the eighth month and return to work by a certain date. Subsequently, this policy was made more

flexible as to date of the commencement of leave, however, arbitrary limits on date of return to work were still enforced. Similar return dates were not applied to disabled males. *Wetzel* v. *Liberty Mutual Insurance Co.*, 372 F. Supp. at 1155, 1159.

In addition, petitioner's health insurance plan, while providing coverage for children of employees who are working for the Company at the time of the birth of the child, excludes from coverage the child of an employee who is absent on a maternity leave of absence at the time of the birth of the child. *Wetzel* v. *Liberty Mutual Insurance Co.*, 372 F.Supp. at 1155. It is stating the obvious to note that no natural born children of women employees would ever be covered under the policy.

The described history of disparate treatment toward women and pregnancy which Liberty Mutual has implemented clearly illustrates a long-standing and pervasive discrimination against women. The policy at issue is simply a part of the Company's other discriminatory practices because it treats female employees in a manner different from male employees.

Further, Liberty Mutual's wage continuation plan protects male employees from the financial strain occasioned by virtually all planned or unplanned physical disabilities which they are likely to encounter. In contrast, female employees who are uniquely susceptible to disability due to pregnancy are not covered by the plan during their period of physical disability. Therefore, the impact of the plan is adverse to women employees and discriminates on the basis of sex.

While it is true that all women workers are not pregnant at any given time, women in the labor force are sus-

ceptible to becoming pregnant.[4] It is not necessary that all women be adversely affected by the policy in issue; it is only necessary that women are affected by the policy at a differential rate than men in order to trigger Title VII review.

A similar situation was presented to this Court when it considered the so-called "grandfather clauses" which exempted from the required literacy test for voting, all persons entitled to vote on a given date, prior to ratification of the Fifteenth Amendment or those whose ancestors were then entitled to vote. While all black persons were not disenfranchised by these clauses, a significant, though by no means *absolute,* number of blacks were harmed, although the policy was neutral on its face. However, a differential rate of black persons were, like the women employees in the instant case, susceptible to being harmed by it. Thus, this Court, finding that no purpose was served by the "grandfather clauses" other than to evade the commands of the Fifteenth Amendment declared "grandfather clauses" invalid. *Guinn* v. *United States,* 238 U.S. 347 (1915). *See also Myers* v. *Anderson,* 238 U.S. 368 (1915).

Under Title VII, as in the "grandfather clause" cases, courts have not required that all members of a class be discriminated against to render a practice unlawful. What is required is that the policy affects a disproportionate number of members of such class. Thus unlawful discrimination in employment was found under Title VII on the basis of excessive garnishment, *Johnson* v. *Pike Corporation of America,* 332 F.Supp. 490 (D.C. Calif. 1971), parenthood of illegitimate children, *Davis* v. *American National Bank of Terrell, Texas,* Civ. Case No. CA3-4512 (N.D. Tex. — F.Supp. —, 1971) and relationship to current employees or union members; *United States* v. *Sheet Metal Workers International Assoc., Local No. 36 and IBEW Local No. 1, AFL-CIO,* 416 F.2d 123 (8th Cir. 1969).

[4] In recent years the most rapid gains in labor force participation rates of women have occurred among wives under age 35, and especially among those with children under six. In fact, among wives with children under three, the latest over-the-year increase was 2½ percentage points, a change matched only once since 1960. Waldman & Whitmore, *Children of Working Mothers, March 1973,* 97 Monthly Labor Rev. 50, 52 (May, 1974). Since 1940, the proportion of working women who are married has increased from 30 to 60 percent. Waldman & McEaddy, *Where Women Work — An Analysis by Industry and Occupation,* 97 Monthly Labor Rev. 3 (1974).

Finally, the exclusion of pregnancy disability under the wage continuation plan at issue undermines the spirit and letter of Title VII. As Congress has indicated in its most recent consideration of equal employment opportunity, "discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." House Report on Equal Employment Opportunity Enforcement Act of 1972, 2 U.S. Code Cong. and Admin. News 2140 (92nd Cong., 2nd Sess. 1972).

Further, the guidelines promulgated by the Equal Employment Opportunity Commission support this view. 29 C.F.R. § 1604.10 (b) provides:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extension, and accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or tem-

> porary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

The Court below accorded deference to the EEOC guidelines in reaching its decision and found them to be consistent with Congressional intent, unlike the guidelines considered in this Court's opinion in *Espinoza* v. *Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973). The guidelines should be given deference because it is the Equal Employment Opportunity Commission which is charged with the enforcement of the statute. *Griggs* v. *Duke Power Co., supra*; *Phillips* v. *Martin-Marietta Corp., supra*; and *Satty* v. *Nashville Gas Company*, No. 75-1083 (6th Cir., Aug. 8, 1975).

It is apparent that Liberty Mutual has offended the policy and requirements of Title VII by treating male employees in a manner different from female employees and by excluding disability due to pregnancy from its wage continuation plan, which exclusion has an adverse impact on women workers who are susceptible to becoming pregnant. For these reasons, the policy in issue is sex discrimination in violation of Title VII.

II. LIBERTY MUTUAL HAS NOT OVERCOME THE SEXUAL IMPACT OF ITS POLICY BY REASONS OF BUSINESS NECESSITY.

If an employer implements a policy or practice which has an adverse impact upon a protected class of employees, this fact in itself does not render the policy or practice illegal under Title VII.[5] However, upon a showing of an

[5] However, should this Court find that the policy at issue herein is outright disparate treatment based on sex, the business necessity test would not apply and the policy would violate Title VII, to which there is no defense.

adverse impact on a protected class of employees, the burden shifts to the employer to justify its policy or practice by reasons of a business necessity to negate the illegal policy or practice. *Griggs* v. *Duke Power Co., supra*; *Robinson* v. *Lorillard Corporation*, 444 F.2d 791 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1971); *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC* v. *United States*, 416 F.2d 980 (5th Cir. 1969). But *see also Jones* v. *Lee-Way Motor Freight*, 431 F.2d 245 (10th Cir. 1970) where the court held that "when a policy is demonstrated to have discriminatory effects, it can be justified only by showing that it is necessary to the safe and efficient operation of the business", 431 F.2d at 249.

The business necessity test was mandated by Congressional intent as a reasonable standard to maintain employer's policies and practices which discriminate against a protected class of employees but are absolutely necessary to continue the operation of the business. *Robinson* v. *Lorillard Corp., supra.* If business necessity cannot be shown, the policy or practice must fall. In *Griggs*, this Court succintly stated the rule:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operated to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. 401 U.S. at 424.

Because the petitioner did *not* adduce any evidence to justify the policy as a business necessity under this Court's guidelines in *Griggs, supra*, the application of this rule to this case is unnecessary, and solely mechanical. As the Court of Appeals for the Third Circuit found: "There are a number of cases that consider the business necessity

defense, but Liberty Mutual has not cited any of them in relation to its justification argument." *Wetzel* v. *Liberty Mutual Ins. Co.*, 511 F.2d 199 at 208 (3d Cir. 1975). Also the District Court when considering the Company's Motion for Reconsideration, noted that the Company did not set forth any evidence in support of its argument. 372 F.Supp. at 1164. The Company stated that it could not present any statistical evidence because none were available. 372 F.Supp. at 1164. The Company also suggested to the court that ". . . it can be assumed that females on pregnancy leave of absence will remain at home longer than normal." As the court found again, no evidence was presented to support this argument. It is an anomaly that the Company would implement its policy of non-coverage of pregnancy-related disabilities under its plan without the benefit of an empirical study to determine, *in fact*, that coverage of such disabilities is *beyond* business realities and practicalities. This policy is seemingly consistent, however, with the Company's prior policies with regard to treatment of women in other terms and conditions of employment. Certainly a major employer like Liberty Mutual does not make such fiscal decisions without completely understanding the ramifications of its employment practices. Rather, the Company has arbitrarily found that women who become pregnant *must* not be covered by the plan.

The petitioner claims in brief that exorbitant costs will result if the pregnancy related disabilities are covered under the plan. Assuming *arguendo* that this is the case, since there is no evidence in this record supporting such claims, the question remains whether the plan can be altered to meet the Title VII proscriptions without an increase in costs. In *Robinson* v. *Lorillard, supra,* the Court of Appeals for the Fourth Circuit found that the employer who has a practice which has an adverse impact upon a protected

class of employees must explore alternatives to determine whether there exists an acceptable alternative which accomplishes the business purpose advanced and which has a lesser impact. The Court stated:

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact, the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

In this case, the Company's business purpose is to adopt a plan which provides disability benefits to its employees. That plan may change from time to time due to the economy, laws, internal employment policies, and other forces. If the court finds that Liberty Mutual's policy of excluding pregnancy-related disabilities violates Title VII, the Company will amend the policy to either account for or offset any increased costs resulting from complying with the law.[6] Of course, that is speculative on the basis of this record;[7] however, suffice it to say that there was no legal requirement placed upon Liberty Mutual to adopt the

---

[6] For example, the State of Ohio has adopted a state employee disability income protection plan which provides a maximum of three years benefits to all employees and covers pregnancy related disabilities. In addition, dollar costs alone have not been determinative in determining the existence of business necessity. *Robinson* v. *Lorillard, supra*; *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2nd Cir. 1971); *Johnson* v. *Pike Corp. of America*, 332 F.Supp. 490 (C.D. Calif. 1971).

[7] Obstetricians generally agree that the period of physical disability ranges between ten days and three weeks after delivery. Note, Love's

plan which it did; that decision will remain Liberty Mutual's. But, the plan finally implemented must meet the legal requirements of Title VII.

III. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PROHIBITS ALL SEX DISCRIMINATION IN CONDITIONS OF EMPLOYMENT AND MAKES UNLAWFUL SEX DISCRIMINATION WHICH MAY NOT BE UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

It is essential in this case to keep the issue in focus: the question is not whether the Equal Protection Clause of the Fourteenth Amendment requires inclusion of disabilities relating to pregnancy within a disability insurance program, but whether Title VII of the Civil Rights Act of 1964 requires such inclusion. Reliance by petitioners on *Geduldig* v. *Aiello,* 417 U.S. 484 (1974) is misplaced because the case at bar concerns statutory interpretation rather than constitutional analysis found in *Aiello.*

Labors Lost: New Conceptions of Maternity Leaves, 7 Harv. Civ. Rights-Civ. Lib. L. Rev. 260, 262, n. 11 (1972). Other obstetricians take a more conservative view: while most women are no longer disabled by the third week following delivery, their physiology does not completely return to normal until five or six weeks after delivery. *Id.* at 287, n. 145. Surely, if employers acted to enforce these medically-ascertainable facts, the cost increase predicted as necessary to cover pregnancy as a disability would be substantially abated.

More importantly, the statistics presented by *amici* are not relevant to the determination of this matter. They reflect neither the business practices which were applicable when the statistics were determined nor the effect which various other aspects of sex discrimination have had distorting the results.

Implicit in petitioner's reliance on *Aiello, supra,* is the premise that Congress, in legislating against discrimination, cannot make *unlawful* as sex discrimination that which is not *unconstitutional* as sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

Aside from the significant factual distinctions between this case and *Aiello,* it is clear that petitioner's premise is unfounded. Congress can remedy problems as they perceive them and make unlawful, actions which are, nonetheless, constitutional.

Petitioner's argument:

> . . . presupposes that the lawful scope of employment policies under the former Act [Title VII] is coextensive with the latter constitutional provision [Fourteenth Amendment]. We believe that the better approach permits Title VII under the Commerce Clause to extend beyond the reach of the Equal Protection Clause. *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964); *Katzenbach* v. *McClung,* 379 U.S. 294. Otherwise, Title VII's effective reach would be limited by the decisions of the Supreme Court, a result effectively curtailing its implementation. *Satty* v. *Nashville Gas Co., supra,* at 8. (Slip opinion.)

In *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966), the Attorney General of the State of New York argued that the Voting Rights Act of 1965 "could not be sustained as appropriate legislation to enforce the equal protection clause unless the judiciary decides that the state action prohibited by the act of Congress is forbidden by the equal protection clause itself. This Court disagreed with the New York State Attorney General stating at page 653 that:

> . . . it was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.

Thus, the Voting Rights Act of 1965 made certain actions on the part of the State of New York unlawful, even though such actions were not unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Similarly, herein, Title VII of the Civil Rights Act of 1964 makes unlawful as sex discrimination petitioner's exclusion of pregnancy disabilities from its disability insurance program even though a similar insurance program of a government body might not be violative of the Equal Protection Clause of the Fourteenth Amendment.

In a related vein, even though there may be no constitutional duty to act under the Fourteenth Amendment to undo *de facto* school segregation, because such discrimination may not be unconstitutional, state legislatures can pass legislation making it unlawful and school boards can take action to eliminate such segregation. *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1, 16 (1971); *Offermann* v. *Nitkowski,* 378 F.2d 22 (1967); *Porcelli* v. *Titus,* 431 F.2d 1254 (3d Cir. 1970); *Tometz* v. *Board of Education,* 39 Ill. 2d 593, 237 N.E.2d 498 (1968); *Addabbo* v. *Donovan,* 16 N.Y.2d 619, 261 N.Y.S.2d 68, 209 N.E. 2d 112 (1965), *cert. denied,* 382 U.S. 905 (1965).

The lesson of these cases is that the Constitution does not set outside limits on what discriminatory acts may be made unlawful. Rather, it sets lower limits on what discriminatory acts are unconstitutional and cannot be made lawful. Thus, while Congress cannot make lawful those actions

forbidden by the Fourteenth Amendment, Congress can make unlawful, actions which are not violative of the Fourteenth Amendment itself.

Comparing the difference between statutory interpretation and constitutional analysis, the court in *Gilbert* v. *General Electric Co.,* 10 F.E.P. Cases 1201, 1205 (4th Cir. June 27, 1975) stated:

> There is a well-recognized difference of approach in applying *constitutional* standards under the Equal Protection Clause as in *Aiello* and in the statutory construction of the "sex-blind" mandate of Title VII. To satisfy constitutional Equal Protection standards, a discrimination need only be "rationally supportable" and that was the situation in Aiello, as well as in Reed and Frontiero. The test in those cases was legislative reasonableness. Title VII, however, authorizes no such "rationality" tests in determining the propriety of its application. It represents a flat and absolute prohibition against all sex discrimination in conditions of employment. (Emphasis in original.)

All of the Circuit Courts of Appeal which have considered this question, and the majority of the District Courts as well, have recognized the difference between applying constitutional standards on the one hand, and statutory construction on the other, and such courts have held that *Aiello, supra,* is not dispositive of a claim for pregnancy disability benefits under Title VII. *Satty* v. *Nashville Gas Company, supra*; *Wetzel* v. *Liberty Mutual Ins. Co., supra*; *Communications Workers* v. *American T. & T. Co.,* 513 F.2d 1024 (2d Cir. 1975); *Gilbert* v. *General Electric Company,* 10 F.E.P. Cases 1201 (4th Cir. June 27, 1975). *See also Holthaus* v. *Compton & Sons,* — F.2d —, 10 F.E.P. Cases 601 (8th Cir. 1975); *Zichy* v. *City of Philadelphia,* — F.Supp. —, 10 F.E.P. Cases 853 (E.D. Pa.

1975) ; *Sale* v. *Board of Education,* 390 F.Supp. 784 (N.D. Iowa 1975) ; *Vineyard* v. *Hollister Elementary School District,* 64 F.R.D. 580 (N.D. Cal. 1974) .

Even though *Aiello* is not applicable to Title VII litigation, that question need not be decided in this case because the facts are so different in the case at bar as to render *Aiello* inapposite. Initially, in *Aiello,* there was no claim or holding that the exclusion of pregnancy disability benefits from the coverage of the plan in question was related to a pattern of sex discrimination. In the case at bar, however, petitioners were found to have engaged in a pervasive pattern of sex discrimination which encompassed disparate treatment of male and female employees in regard to salaries, promotions, recruitment, and hiring practices.

Further, disability due to abnormal pregnancy was covered by the compensation plan considered in *Aiello* as of January 1, 1974. *See Aiello, supra,* at 490-491, note 15. Only normal pregnancy and delivery disabilities were excluded from the benefits. In contrast, Liberty Mutual has excluded all pregnancy-related disabilities. As the Third Circuit noted in its opinion, "at oral argument, appellant's counsel declared that the company's income protection plan would not cover a disability suffered by a pregnant woman but would have covered the disability had the woman not been pregnant." *Wetzel* v. *Liberty Mutual Insurance Co., supra,* at 203.

Petitioner and *amici* supporting petitioner contend that affirming the decision of the Court of Appeals below would impose a different standard upon private, as opposed to public, employers. Such a conclusion is erroneous. Initially, *Aiello* concerned requirements imposed by the Equal Protection Clause of the Fourteenth Amendment, not those imposed by Title VII. Further, Title VII, as amended by Congress in 1972, applies to state and local

governments as well as to private employers. The prohibitions and requirements of the act, whatever they are determined to be, will be equally applicable to the public and private sectors.

CONCLUSION

The State of Ohio respectfully requests the Court to affirm the lower court's decision on the basis of the record in this case and the legal arguments presented herein. Should the Court decide that the record is incomplete on the question of whether a business justification exists to support the policy at issue, the Court may wish to remand the case to the trial court to adduce further evidence on this question, should any exist. However, if this approach is taken, this Court should articulate the standards establishing what constitutes business necessity under the facts of this case.

Respectfully submitted,

WILLIAM J. BROWN
Ohio Attorney General

ANDREW J. RUZICHO
EARL M. MANZ

Ohio Assistant Attorneys General
State Office Tower
15th Floor
30 East Broad Street
Columbus, Ohio 43215

Attorneys for the State of Ohio,
Amicus Curiae

OF COUNSEL:
ELIZABETH BARINGHAUS

Supreme Court, U. S.
FILED
SEP 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A Corporation,

Petitioner,

vs.

SANDRA WETZEL and MARI ROSS, on behalf of Themselves and All Others Similarly Situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, AS *AMICUS CURIAE*

MARY K. O'MELVENY
JONATHAN W. LUBELL
H. HOWARD OSTRIN
1370 Avenue of the Americas
New York, New York 10019

CHARLES V. KOONS
1100 Seventeenth Street, N.W.
Washington, D. C. 20036
Attorneys for
Communications Workers of America, AFL-CIO, as Amicus Curiae

TABLE OF CONTENTS

PAGE

Interest of the *Amicus* 1

Opinions Below 5

Question Presented 5

Introductory Statement 5

Summary of Argument 8

ARGUMENT—

I. The Courts Below Were Correct In Finding Prohibited Sex Discrimination Under Title VII 11

A. Petitioner's Policies Are Not Related To Its Fringe Benefit Objectives 12

B. Discriminatory Impact on Women Generally 13

C. Discriminatory Impact on Women in the Bell System 15

D. Exclusion of Pregnancy from Employment Disability Programs Fails to Provide Aggregate Risk Protection 17

II. The Mere Invocation of Costs Cannot Be a Defense To Failure To Affording Equal Benefits To Women Disabled By Pregnancy 20

A. The Title VII Defense of Business Necessity Does Not Include the Defense that an Increase in Costs Will Justify a Policy Which Discriminates Against a Protected Group 20

B. The Public Policy of Non-Discrimination Precludes Justifing Discriminatory Practices in Terms of Costs 23

PAGE

1. Discrimination 23

2. Other Areas of Law 25

C. The Cost Defense Is Irrelevant In Light of Employer Motives For Affording Disability or Other Fringe Benefits 27

III. Objective Statistics Demonstrate That Probable Costs of Providing Equal Benefits To Women Disabled By Pregnancy Are Not As Great As Claimed and Would Not Be Sufficient To Satisfy Title VII Business Necessity Standards 29

A. The Bell System Statistics 29

B. Insurance Company Statistics 34

1. Insurance Industry Statistics Do Not Present An Accurate Picture of Present Disability Patterns 35

2. Sex-Based Insurance Classifications Are Actuarially Suspect 37

C. Objective Statistics and Actual Private Employer Experience Show That Anticipated Costs Will Not Be As Great As Petitioner Claims 40

D. Congress, Federal Agencies, States and Other Countries Have Determined to Provide Disability Protection to Women Disabled by Pregnancy 43

CONCLUSION 45

TABLE OF AUTHORITIES

CASES: PAGE

Albemarle Paper Co. v. *Moody*, —— U.S. ——, 45 L. Ed. 2d 280 (1975) 25

Bowe v. *Colgate-Palmolive, Inc.*, 489 F. 2d 896 (7th Cir. 1969) 25

Bowles v. *Willingham*, 321 U.S. 503 (1944) 27

Cato v. *Parham*, 297 F. Supp. 403 (E.D. Ark. 1969) 24

Cedar Rapids Community School District v. *Parr*, 6 FEP Cases 101 (D. Iowa 1973) 45

Cleveland Board of Education v. *LaFleur*, 414 U.S. 632 (1974) 6, 22

Communications Workers of America v. *American Telephone & Telegraph Co., Long Lines Department*, 513 F. 2d 1024 (2d Cir. 1975), *pet. for cert. filed*, 43 U.S.L.W. 3684, No. 74-1601 (June 19, 1975), *reversing* 379 F. Supp. 697 (S.D.N.Y. 1974) 2, 45

CWA v. *Illinois Bell Tel. Co.*, No. 73-C-959 (N.D. Ill. 1973) 2

CWA v. *Southern Bell Tel. & Tel.*, No. 18328 (N.D. Ga. 1973) 2

CWA v. *Southwestern Bell Telephone Co.*, Civil Action No. 74-315 (E.D. Missouri) 2

CWA v. *New York Tel. Co.*, C.A. No. 73-3352 (S.D.N.Y. 1973) 2

CWA v. *The Pacific Tel. & Tel. Co.*, C.A. No. C-73-1739 RFP (N.D. Cal. 1973) 2

CWA v. *South Central Bell Tel. Co.*, C.A. No. 73-1771 Section A (E.D. La. 1973) 2

Commonwealth Edison Co. v. *Allis-Chalmers Manufacturing Co.*, 245 F. Supp. 889 (N.D. Ill. 1965) 26

Corning Glass Works v. *Brennan*, 417 U.S. 188 (1974) 24

PAGE

Dandridge v. *Williams*, 397 U.S. 471 (1970) 21
Dessenberg v. *American Metal Forming Co.*, 8 FEP Cases 290 (N.D. Ohio 1973) 20, 45
Doe v. *Osteopathic Hospital of Wichita*, 333 F. Supp. 1357 (D. Kan. 1971) 6
Drake v. *Covington County Board of Education*, 371 F. Supp. 974 (M.D. Ala. 1974) 6

E.E.O.C. v. *A.T.&T. Co.*, 365 F. Supp. 1105 (E.D. Pa. 1973) *mod. o. o. g.* 506 F. 2d 735 (3d Cir. 1975) 16

Farkas v. *South Western City School District*, 8 FEP Cases 288 (S.D. Ohio 1974) *aff'd.*, 506 F. 2d 1400 (6th Cir. 1974) 17, 45

Geduldig v. *Aiello*, 417 U.S. 484 (1974) 2, 5, 8, 9, 11, 17, 18, 19, 20, 27, 28, 44
Gilbert v. *General Electric Co.*, 375 F. Supp. 367 (E.D. Va. 1974) *aff'd.*, —— F. 2d ——, 10 FEP Cases 1201 (4th Cir. 1975) *joint pet. for cert. pending*, Nos. 74-1589 and 1590 ..... 6, 7, 18, 20, 21, 22, 25, 28, 45
Goldberg v. *Kelly*, 397 U.S. 254 (1970) 27
Goss v. *Board of Education, City of Knoxville, Tenn.*, 482 F. 2d 1044 (6th Cir. 1973), *cert. den.* 414 U.S. 1171 (1974) 24
Griggs v. *Duke Power Company*, 401 U.S. 424 (1971) 8, 11, 13, 17, 21

Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 24

PAGE

Holthaus v. *Compton & Sons, Inc.*, 514 F. 2d 651 (8th Cir. 1975) 6, 45
Hutchison v. *Lake Oswego School Dist.*, 374 F. Supp. 1056 (D. Ore. 1974), *aff'd. in part*, Nos. 74-3181, 3182 (9th Cir. 1975) 6, 45

In re Crown Zellerbach Corp., CCH Trade Reg. Rep. 1957-1958 ¶26, 923, at p. 36, 462 (FTC 1958) 26
International Boxing Club v. *United States*, 358 U.S. 242 (1959) 26

James v. *Strange*, 407 U.S. 128 (1972) 27
Johnson v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364 (5th Cir. 1974) 25

Lillo v. *Plymouth Board of Education*, 8 FEP Cases 21 (N.D. Ohio 1973) 45
Local 189, United Papermakers & Paperworkers v. *United States*, 416 F. 2d 980 (5th Cir. 1969), *cert. den.* 397 U.S. 919 (1970) 11, 21

Kahn v. *Shevin*, 416 U.S. 351 (1974) 14

Pettway v. *American Cast Iron Pipe Co.*, 494 F. 2d 211 (5th Cir.) 25
Phillips v. *Martin-Marietta Corp.*, 400 U.S. 542 (1972) 7, 28
Potlatch Forests, Inc. v. *Hays*, 318 F. Supp. 1368 (E.D. Ark. 1970), *aff'd.*, 465 F. 2d 1081 (8th Cir. 1972) 23

Robinson v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971), *cert. dism.* 404 U.S. 1006 (1971) 21
Rogers v. *Equal Employment Opportunity Commission*, 454 F. 2d 234 (5th Cir. 1971), *cert. den.*, 406 U.S. 957 (1972) 12

PAGE

Rosen v. *Public Service Elec. & Gas Co.*, 477 F. 2d 90 (3d Cir. 1973) 25

Sale v. *Waverly-Shell Rock Board of Education*, 9 FEP Cases 138 (N.D. Iowa 1975), *leave to appeal den.*, —— F. 2d —— (8th Cir. 1975), Misc. No. 75-8088 45
Satty v. *Nashville Gas Company*, 384 F. Supp. 765 (E.D. Tenn. 1975), *aff'd.*, —— F. 2d ——, 11 FEP Cases 1 (6th Cir. 1975) 6, 44, 45
Scott v. *Opelika City Schools*, 63 F.R.D. 144 (M.D. Ala. 1974) 45
Shapiro v. *Thompson*, 394 U.S. 618 (1969) 27
Sprogis v. *United Airlines, Inc.*, 444 F. 2d 1194 (7th Cir. 1971), *cert. den.* 404 U.S. 991 (1971) 6, 21
Stern v. *Massachusetts Indemnity and Life Insurance Co.*, 365 F. Supp. 433 (1973) 39
Swann v. *Charlotte-Mecklenburg Board of Education*, 306 F. Supp. 1299 (W.D.N.C. 1969) 24

Union Free School District No. 6 v. *New York State Human Rights Appeal Board*, 35 N.Y. 2d 371 (1974) *reargument den.*, 36 N.Y. 2d 807 (1975) 44
U. S. v. *Bethlehem Steel Corp.*, 446 F. 2d 652 (2nd Cir. 1971), *cert. dism.* 404 U.S. 1006 (1971) 21
United States v. *Corn Products Ref. Co.*, 234 F. 964 (S.D.N.Y. 1916), *app. dism.* 249 U.S. 261 (1919)..... 26
United States v. *Crescent Amusement Co.*, 373 U.S. 173 (1944) 26
U. S. v. *E. I. DuPont & Co.*, 366 U.S. 316 (1961) 26
U. S. v. *E. I. DuPont de Nemours*, 177 F. Supp. 1 (D. Ill. 1959) 26
U. S. by Katzenbach v. *Gulf State Theatres, Inc.*, 256 F. Supp. 549 (D.C. Miss. 1966) 23

PAGE

Vineyard v. *Hollister Elementary School District*, 64 F.R.D. 580 (N.D. Cal. 1974) 45

Weinberger v. *Weisenfeld*, —— U.S. ——, 43 L. Ed. 2d 514 (1975) 27
Wetzel v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239 (3d Cir. 1975) 5, 31

Yuba v. *Consolidated Industries Inc.*, 136 N.L.R.B. 683 (1962) 25

Zichy v. *City of Philadelphia*, 392 F. Supp. 338 (E.D. Pa. 1975) 20, 45

CONSTITUTION, STATUTES AND REGULATIONS:

Constitution of the United States:

Commerce Clause, Art. 1, §8 23

Fourteenth Amendment 8, 11, 17, 21, 28

Civil Rights Act of 1964, as amended:

42 U.S.C. 2000a 24

42 U.S.C. 2000e, *et seq.* (Title VII).....2, 3, 5, 7, 8, 9, 11, 17, 18, 20, 21, 23, 25, 29, 34, 40, 44, 45, 46

Equal Employment Opportunity Commission Guidelines:

29 C.F.R. 1604.9(e) 9, 20, 22

29 C.F.R. 1604.10 .....9, 11, 29, 40, 43

Equal Pay Act, 29 U.S.C. 206(d) 24

PAGE

General Education Provisions Act, 20 U.S.C. §1232 44

Maryland Human Relations Commission Sex Discrimination Guidelines, BNA: FEP Manual 451:544, 820.08(e) 22

New York Human Rights Law, Executive Law §297 *et seq.* 44

New York Division of Human Rights, Rulings on Inquiries, §16.G 22

Office of Federal Contract Compliance Proposed Guidelines on Sex Discrimination, 41 C.F.R. §60-20.3 ....29, 44

Railroad Unemployment Insurance Act, 45 U.S.C. 351 (k)(2) 43

Supreme Court Rules, 42(2) 1

United States Civil Service Commission Regulations, 5 C.F.R. §630.401(b) 44

United States Department of Health, Education and Welfare, Guidelines on Sex Discrimination, 40 *Federal Register* No. 108, §86.57 (June 4, 1975) 44

CONGRESSIONAL MATERIAL:

"Report of Proceedings of Hearings on Economic Problems of Women," *Joint Economic Committee of Congress*, Vol. 3 (July 12, 1973) 36, 38, 39

SECONDARY SOURCES:

Allen, *Fringe Benefits: Wages or Social Obligation* (1964) 13, 28

Armknect & Early, "Manufacturing Quit Rates Revisited: Secular Changes and Women's Quits," *Monthly Labor Review*, December, 1973 33

PAGE

California Assembly, Joint Committee on Unemployment Compensation Disability Insurance, Final Report 43 (1966) 38

Cary, "Pregnancy Without Penalty," 1 *Civ. Lib. Rev.* 31 (1974) 7

Citizens' Advisory Council on the Status of Women, "A Statement of Principles with Respect to Job-Related Maternity Benefits," *Women in 1970* (G.P.O. 1971) 7, 32

Citizens' Advisory Council on the Status of Women, Item 20-N (July 2, 1971) 7, 43

Citizens' Advisory Council on the Status of Women, Letter of J. Gutwillig, Chairman, to Secretary of Labor, June 27, 1974 and annexed Statistical Bulletin Tables 30, 32

Comment, "*Geduldig* v. *Aiello:* Pregnancy Classifications and the Definition of Sex Discrimination," 75 *Columbia Law Review* 440 (1975) 7, 13, 33, 44

Comment, "Loves Labors Lost: New Conceptions of Maternity Leaves," 7 *Harvard Civil Rights-Civil Liberties Rev.* 260 (1972) 7

Communications Workers of America, *Report on Major Improvements and Changes Agreed Upon by CWA and A.T.&T. and its Subsidiaries* (August 5, 1974) 42

Equal Employment Opportunity Commission Report, "A Unique Competence: A Study of Equal Employment Opportunity in the Bell System," 1971 ("Copus Report") 14, 15, 16, 25, 31, 32

PAGE

Gilhooly, "Equal Rights and Insurance," *Chartered Life Insurance Underwriters,* Vol. 29, 1975 39

Greenwald, "Maternity Leave Policy," *New England Economic Review,* p. 13, January, 1973 .....40, 41

Gutwillig, Address to American Hospital Assn. Inst., Key Biscayne, Florida (July 27, 1972) 33, 41

Hayden, *Punishing Pregnancy: Discrimination in Education, Employment and Credit,* American Civil Liberties Union: Women's Rights Project, October, 1973 7

Hayghe, "Marital and Family Characteristics of the Labor Force in March 1973," *Monthly Labor Review* (April 1974) 14

Hickey, "Changes in State Unemployment Insurance Legislation," *Monthly Labor Review,* January, 1974 44

Hutchison & Wright, "Pregnancy Disability-Time Duration and Disability Benefits Costs," (Xerox Corporation 1974) 30, 31, 43

Hunt, Report and Recommendations for the Office of the Secretary, Department of Health, Education & Welfare: "Occupational Health Problems of Pregnant Women" (April 30, 1975) 13

Johnston, "Sex Discrimination and the Supreme Court," 49 *New York University Law Rev.* 617 (1974) 7

Koontz, "Childbirth and Child Rearing Leave: Job Related Benefits," 17 *New York Law Forum* 481 (1971) 7

Mead & Kaplan, *American Women* (1965) 45

PAGE

Murray, "Economic and Educational Inequality Based on Sex: An Overview," 5 *Valparaiso U. L. Rev.* 237 (1971) 13

New York State Department of Insurance, Opinion and Report of the Superintendent of Insurance (January 28, 1975) 37

Prentice-Hall, *Personnel Management Policies & Practices Report Bulletin,* No. 16 (1973) 13

Prentice-Hall, Report Bulletin No. 24 (March 26, 1974) 43

Prentice-Hall Report Bulletin No. 25 (June 6, 1972) 33

President's Commission on the Status of Women, "Report of the Committee on Social Insurance and Taxes," p. 57 (Oct. 1963) 7

Society of Actuaries, *Transactions,* 1972, No. 2, June, 1972 43

Transactions of the Society of Actuaries:

1962 "Reports of Mortality and Morbidity Experience" 35, 36, 38

1971 "Reports of Mortality and Morbidity Experience" 36, 37

1973 "Reports of Mortality and Morbidity Experience" 37

United States Civil Service Commission, Federal Personnel Manual Supplement 990-2, sub-chapter S 13 (1974) 44

U. S. Department of Commerce, "Consumer Income," Series P-60, N 93 (July 1974) 14

PAGE

U. S. Department of Health, Education and Welfare, "Social Security Programs Throughout the World, 1971," Research Report No. 40 (1971) 45

U. S. Department of Health, Education and Welfare, "Time Lost From Work Among the Currently Employed Population, United States—1968," Vital and Health Statistics, Series 10, No. 71, Table B, pp. 5-7 31

U. S. Department of Labor: *Digest of Health Insurance Plans,* Vol. II (1974 ed. and 1975 supplement) 43

U. S. Department of Labor: Bureau of Labor Statistics, "Employment and Earnings, August 1975," Vol. 22, No. 2 42

U. S. Department of Labor: Women's Bureau, *Fact Sheet on the Earnings Gap* (rev. ed. 1972) 14

U. S. Department of Labor: Women's Bureau, Bulletin No. 240, "Maternity Protection of Employed Women" (1971) 45

U. S. Department of Labor: Women's Bureau, *Underutilization of Women Workers* (rev. ed. 1971)..... 14

U. S. Department of Labor: Women's Bureau, *Why Women Work* (rev. ed. May, 1974) 13

U. S. Department of Labor: Bureau of Labor Statistics, "Marital and Family Characteristics of Workers, March 1969," Special Labor Force Report No. 120 13

Waldman & McEaddy, "Where Women Work—An Analysis by Industries and Occupation," *Monthly Labor Review,* May 1973, p. 3 14

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A Corporation,

Petitioner,

vs.

SANDRA WETZEL and MARI ROSS, on behalf of Themselves and All Others Similarly Situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, AS *AMICUS CURIAE*

Interest of the *Amicus*

The Communications Workers of America, AFL-CIO, (hereinafter "CWA") submits this brief *amicus curiae* with the consent of all parties pursuant to Supreme Court Rule 42(2).[1] CWA is an international labor organization representing non-supervisory employees in the communications industry and other industries throughout the country.

---

[1] Letters of counsel for Petitioner and Respondents consenting to the filing of this brief have been filed with the Clerk of the Court.

As of October, 1974, CWA represented 500,881 employees in collective bargaining units at the American Telephone & Telegraph Company and Associated Bell Companies (hereafter "Bell System"). 55% of these employees are women.

CWA is a party plaintiff in seven cases now pending in six federal district courts[2] involving the application of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.* (hereafter "Title VII" or "the Act") to the denial by Bell System employers of equal rights, benefits and privileges of employment to women disabled by pregnancy. One of these cases, *Communications Workers of America, et al.* v. *American Telephone & Telegraph Company, Long Lines Department,* is presently before this Court on Petition for Writ of Certiorari filed by American Telephone & Telegraph Company, Long Lines Department (hereafter "A.T.&T.") on June 19, 1975.[3] The district court dismissed *sua sponte* CWA's complaint against A.T.&T. due to this Court's decision in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974) (*"Aiello"*) on July 11, 1974, 379 F. Supp. 697 (S.D.N.Y. 1974). The United States Court of Appeals for the Second Circuit reversed the district court on March 26, 1975 and remanded the case for further proceedings, 513 F. 2d 1024 (2d Cir. 1975). Upon this Court's granting of certiorari in the case at bar, proceedings there

[2] *CWA* v. *A.T.&T., Long Lines Department, petition for cert.* filed, 43 U.S.L.W. 3684 (U.S. June 24, 1975) (No. 74-1601); *CWA* v. *Illinois Bell Tel. Co.,* No. 73-C-959 (N.D. Ill., 1973); *CWA* v. *Southern Bell Tel. & Tel.,* No. 18328 (N.D. Ga., 1973); *CWA* v. *New York Tel. Co.,* C.A. No. 73-3352 (S.D.N.Y., 1973); *CWA* v. *Southwestern Bell Telephone Co.,* Civil Action No. 74-315 (E.D. Missouri); *CWA* v. *The Pacific Tel. & Tel. Co.,* C.A. No. C-73-1739 RFP (N.D. Cal., 1973); and *CWA* v. *South Central Bell Tel. Co.,* C.A. No. 73-1771 Section A (E.D. La., 1973).

[3] No. 74-1601. Respondents' Brief in Opposition, filed September 3, 1975, indicated the reasons why certiorari might be denied, but also requested consolidation with this case in the event certiorari was granted without summary affirmance.

have been stayed pending determination of the merits insofar as the Court's decision here could affect further proceedings in that action.[4]

The Bell System provides its employees with an employer-funded fringe benefit in the form of a "Plan for Employees' Pension, Disability Benefits and Death Benefits" (herein "the Plan"). Any employee unable to work for more than seven days, regardless of the cause of disability, is entitled to the protection of the Plan during the disability period. This protection includes significant employment rights such as retention of service credit (seniority), wage progression credit, reinstatement priority, paid medical and hospitalization insurance premiums and weekly income protection payments based on a formula related to the salary and service credit of a disabled employee. Retention of service credit affects an employee's entitlement to pensions, vacations, transfer, promotion, continued disability protection, and guarantees job retention rights in the case of lay-offs.

Only women disabled by pregnancy are excluded from the Plan's protection. Sickness benefits afforded under the Plan established by Bell System employers are charged as operating expenses of the company "as and when paid." Payments under the Plan are made to all disabled employees except women disabled by pregnancy, regardless of the number of employees disabled in any given fiscal year. The Plan's protection is not geared to actuarial statistics, nor does it contain any limitation on the number or type of covered disabilities employees claim in any given year. Length of income protection eligibility is based upon length of service with the company. The Bell System's concept of

[4] All the other CWA cases have, in effect, been stayed pending action by this Court.

aggregate risk protection is aimed at the risk of *disability* and is unconcerned with the type of condition or its cost or duration. No sex-unique disability other than pregnancy is denied protection.

CWA has been working to include women disabled by pregnancy within the scope of employer disability benefits plans in various companies including the Bell System for many years. It has assisted its female members in processing complaints with the Equal Employment Opportunity Commission ("EEOC") and state fair employment practices agencies implementing legislation comparable in scope and intent to Title VII, and has instituted grievance proceedings on their behalf. In April, 1972 CWA filed Charges of Discrimination with the EEOC against the Bell System on behalf of its female members and followed with the filing of the lawsuits described above.

In all of these actions, the Bell System defendants have interposed a defense to the claim of sex discrimination under Title VII which denies liability for disparate treatment of women disabled by pregnancy on the grounds that such treatment is "based upon a rational and neutral business justification under the Act." This defense, often referred to as the "business necessity" defense, includes the contention that the costs of covering pregnancy disability are too great to mandate Bell System compliance with the Act's prohibition of sex discrimination.[5] In view of the

[5] Petitioner's brief (pp. 15-18, 21-24) and Petition for Writ of Certiorari, p. 9 and n. 17) discuss the costs of equal treatment of women disabled by pregnancy, alleging that they constitute a "legitimate consideration" for disparate treatment of such disabilities. At the trial court, Liberty Mutual offered no substantive evidence of a cost or business necessity defense, 372 F. Supp. at 1162-1164. The Third Circuit noted that Liberty Mutual "did not assert at trial or on its motion for reconsideration any affirmative defense, nor did it allege any evidentiary facts that could arguably give rise to a defense," 511 F. 2d at 208.

concerns expressed by this Court in *Aiello* over the costs of providing equal insurance coverage to women disabled by pregnancy, 417 U.S. at 495-496, CWA is anxious to have its views before the Court on the availability and applicability of the business necessity defense in this case interpreting Title VII.

Opinions Below

The opinion of Judge Weber of the Western District of Pennsylvania granting respondents' motion for summary judgment is reported at 372 F. Supp. 1147. The opinion of the United States Court of Appeals for the Third Circuit, affirming the district court in all respects, is reported at 511 F. 2d 199.[6]

Question Presented

Does an employer's exclusion from coverage of pregnancy-related disabilities from an otherwise comprehensive employee disability income protection plan constitute sex discrimination proscribed by Title VII of the Civil Rights Act of 1964?

Introductory Statement

Employment discrimination based upon stereotypical judgments about women, like minorities, has led employers to claim numerous excuses for permitting differential treatment in the job marketplace. Perhaps the most com-

[6] Liberty Mutual's hiring and promotional practices were held discriminatory by the trial court at 372 F. Supp. 1152-1155, and affirmed by the Third Circuit at 508 F. 2d 239 (3d Cir. 1975). Liberty Mutual has filed a separate Petition for Writ of Certiorari (No. 74-1288) seeking review of that decision.

mon stereotype which has plagued women who seek equal access to every aspect of employment, has been the notion that their childbearing function or potential will ultimately make them part-time or one-time employees, thereby making it wasteful or economically burdensome to hire, train, promote, or transfer them or to afford comparable fringe benefits on a par with those afforded to men. These notions about a woman's actual or potential motherhood have operated historically to exclude most women from meaningful jobs and many from any job at all. Liberty Mutual's denial of income protection benefits to women disabled by pregnancy, and its termination of these women, are merely one aspect of the many methods used by employers, relying upon stereotypes surrounding the biological fact that women bear children, to limit or deny equal employment rights to women.[7] It is significant that the only sex dis-

[7] In the case of the Bell System, the denial of benefits includes loss of other employment rights such as seniority and wage progression credit. In cases such as *Satty* v. *Nashville Gas Company*, 11 FEP 1 (6th Cir. 1975), *affg.* 384 F. Supp. 765 (E.D. Tenn. 1975), and *Hutchison* v. *Lake Oswego School District*, Nos. 74-3181, 3182 (9th Cir. July 21, 1975), *affg. in part* 374 F. Supp. 1056 (D. Ore. 1974), employers refused to permit women disabled by pregnancy to obtain accumulated paid sick leave for pregnancy disability. In cases such as *Holthaus* v. *Compton & Sons, Inc.*, 514 F.2d 651 (8th Cir. 1975), the employer terminated a woman so disabled, rather than permit use of accrued vacation pay and then leave without pay. In *Gilbert* v. *General Electric Co.*, 375 F. Supp. 367 (E.D. Va. 1974), affd., —— F. 2d ——, 10 FEP Cases 1201 (4th Cir. 1975), *joint pet. for cert. pending*, Nos. 74-1589 and 1590 (hereafter *"Gilbert"*), the challenge to the employer's disparate treatment of pregnancy originally included a policy which forced pregnant employees to leave at the sixth month of pregnancy, a policy subsequently invalidated by this Court in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974). The marital status of women, but not men, has been used to bar hiring or force resignation, *Sprogis* v. *United Airlines, Inc.*, 444 F. 2d 1194 (7th Cir. 1971), *cert. den.* 404 U.S. 991 (1971). Employers have refused to employ or fired unwed mothers, but not unwed fathers, *Doe* v. *Osteopathic Hospital of Wichita*, 333 F. Supp. 1357 (D. Kan. 1971); *Drake* v. *Covington County Board of Education*, 371 F. Supp. 974 (M.D. Ala. 1974).

crimination case under Title VII to come before this Court involved an employer's policy of refusing to hire women on the basis of their status as mothers of pre-school children. *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1972).

The adverse impact of the policies challenged in this action upon working women is clear. It is not mere economics which prevent employers from according equal treatment to women disabled by pregnancy; the economics merely shroud a societal stereotype of women as mothers first and workers second. The singling out of a major portion of the labor force for disparate treatment because of an immutable biological fact necessary for human survival is wrong.[8] To achieve the full equality for all required by Title VII, we must afford equal rights to all. As Judge Mehrige recognized in *Gilbert*, 375 F. Supp. at 383:

> If it be viewed as a greater economic benefit to women, then this is a simple recognition of women's

[8] This distortion of the unique role women play in the reproductive process to a defense for barring them from the productive process of full employment has been the subject of intensive study and analysis. See, e.g., Hayden, *Punishing Pregnancy: Discrimination in Education, Employment and Credit*, American Civil Liberties Union: Women's Rights Project, October, 1973, pp. 21-63; Citizens' Advisory Council on the Status of Women (herein "CACSW"), "A Statement of Principles with Respect to Job Related Maternity Benefits," *Women in 1970* (G.P.O. 1971); Comment, "Loves Labors Lost: New Conceptions of Maternity Leaves," 7 *Harvard Civil Rights—Civil Liberties Rev.*, 260 (1972); Koontz, "Childbirth and Child Rearing Leave: Job Related Benefits," 17 *New York Law Forum*, 481 (1971); President's Commission on the Status of Women, "Report of the Committee on Social Insurance and Taxes," p. 57 (Oct. 1963); Comment, *"Geduldig* v. *Aiello:* Pregnancy Classifications and the Definition of Sex Discrimination," 75 *Columbia Law Review* 440, 456-461 (1975) (herein "Pregnancy Classifications"); Cary, "Pregnancy Without Penalty," 1 *Civ. Lib. Rev.*, 31 (1974); Johnston, "Sex Discrimination and the Supreme Court," 49 *New York University Law Rev.*, 617, 642-661, 673-688 (1974).

biologically more burdensome place in the scheme of human existence. An industrial policy which does not account for this fails in providing such sexual equality as is within its power to produce.

Summary of Argument

1. The Court below correctly found that an employment policy which fails to treat women disabled by pregnancy in the same manner as all other disabled employees discriminates on the basis of sex in violation of Title VII of the Civil Rights Act. The Court properly held that this Court's Equal Protection Clause analysis of a state social welfare decision in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), had no application to the statutory analysis required under *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). Petitioner's disability policies single out a group of women protected by Title VII for disparate treatment of a disability they alone suffer by relying upon stereotyped notions of the childbearing function of women and the place they occupy in the job market. Petitioner's disability program is not grounded on equalized actuarial factors. It insures employees against the risks attendant to inability to work, not against particular conditions. Thus, it does not provide "aggregate risk protection" to men and women alike. Employer denial of protection to women disabled by pregnancy aggravates existing salary, hiring and promotional discrimination, and limits their full enjoyment of employment rights available to all other employees. The objectives of employer disability benefits programs are related to employee loyalty, morale and productivity. Exclusion of a statistically predictable number of women from their coverage does not serve these objectives. The operation of these policies denies equal employment benefits

to women in an arbitrary and unnecessary manner condemned by Title VII.

2. The Court below correctly rejected Petitioner's unsubstantiated claims of costs as a defense to its exclusion of women disabled by pregnancy from its disability program. Costs are not a defense to discriminatory treatment of protected groups under Title VII and are insufficient to constitute the type of "business necessity" which could excuse such discrimination. Neither the courts, nor the Equal Employment Opportunity Commission Guidelines implementing Title VII, permit claimed costs to justify disparate treatment. Petitioner has failed to meet the stringent test of "business necessity" by failing to demonstrate that its policies are necessary in order for it to remain in business, that exclusion of pregnancy is related to its fringe benefit objectives, and that no acceptable alternative exists which would accomplish the objectives of disability protection with a lesser differential impact. The public policy of eliminating all vestiges of discrimination, as expressed by Congress in Title VII, precludes the defense of costs as an excuse for failing to comply with the law. The fact that it is less profitable to do business in a lawful manner has been rejected as a defense in many areas of the law, both in the area of racial discrimination and in other areas, such as antitrust violations. The rejection of the costs defense is not inconsistent with this Court's holding in *Geduldig* v. *Aiello, supra,* because the motives of an employer in establishing fringe benefits have self-serving ends, in contrast to the altruistic objectives of states in establishing social welfare programs to assist their citizens under the police power. The differing objectives of employers are a further indication that mere finances cannot excuse discrimination against a substantial segment of its female employees.

3. Petitioner has been unable to provide any objective data which would show that the costs it claims would be incurred in granting protection to women disabled by pregnancy are either accurate or devastating under the concept of business necessity. Statistics submitted by various *amici curiae,* and relied upon by Petitioner, fail to show that women presently benefit disproportionately from benefits programs or that the coverage of pregnancy-related disability will prove too great. *Amici's* statistics are self-serving, fail to include relevant factors other than sex which affect disability frequency and severity, are based upon data which is limited by age and scope, and limited by stereotypes about women. This data also excludes the impact that past and present discrimination has had upon women. Neutral studies of projected disability costs, on the other hand, indicate that protecting women disabled by pregnancy will increase employer costs by a mere fraction of their total wage and salary costs. This conclusion is supported by the fact that Congress, federal agencies, numerous private employers, many states and most other nations have elected to protect women from this risk of disability without any of the disastrous consequences predicted by Petitioner and *Amici.*

ARGUMENT

I.

The Courts Below Were Correct In Finding Prohibited Sex Discrimination Under Title VII.

The Courts below found Liberty Mutual's exclusion of pregnancy disability from benefit protection to be in violation of Title VII and the EEOC Guidelines of Sex Discrimination interpreting the Act, 29 C.F.R. §1604.10.[9] The Third Circuit found this court's Equal Protection Clause analysis in *Aiello* to have no application to the statutory question of whether the employer had engaged in sex discrimination prohibited by Title VII, 511 F. 2d at 203-204. The Court turned instead to the direct interpretation of Title VII expressed in *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431 (*"Griggs"*) holding that employment practices which treat a protected class of persons in a disparate manner, despite the appearance of neutrality, are forbidden. The adverse impact of the policies challenged here and elsewhere upon women is major and irremediable unless Title VII's proscription of disparate treatment is upheld by this Court.[10]

---

[9] See, 511 F. 2d at 203-207 and 372 F. Supp. at 1157-1164. Amicus understands that other briefs *amicus curiae* will address the correctness of these Guidelines and the courts' deference to them.

[10] This Court interpreted Title VII in *Griggs* as barring "neutral" practices which "operate invidiously to discriminate on the basis of racial or other impermissible classifications," 401 U.S. at 431. Even assuming that the exception in *Aiello's* footnote 20 of pretexts for invidious discrimination could properly be applied beyond the factual and legal context of that case, it must be assumed that, under Title VII, Liberty Mutual's policies cannot stand since they *operate* in a discriminatory manner. Pretexts for invidious discrimination under the Fourteenth Amendment involve questions of motive, but motive is irrelevant under Title VII. ***Local 189, United Papermakers & Paperworkers*** **v.** ***United States,***

A. Petitioner's Policies Are Not Related To Its Fringe Benefit Objectives

The employer decision to make fringe benefits available to its work force plays a critical role in the employee's decision to accept a job and to remain in that work force and seek better and more responsible positions within it. Vacations, sick leave, disability protection, insurance coverage and retirement programs may often be more attractive to a potential employee than the actual wages she or he receives. As the Fifth Circuit noted in *Rogers* v. *Equal Employment Opportunity Commission,* 454 F. 2d 234, 238 (5th Cir. 1971), *cert. den.,* 406 U.S. 957 (1972):

> As wages and hours of employment take subordinate roles in management-labor relationships, the modern employee makes ever-increasing demands in the nature of intangible fringe benefits. Recognizing the importance of these benefits, we should neither ignore their need for protection, nor blind ourselves to their potential misuse.

Employers afford fringe benefits to increase work-force loyalty, morale and productivity, as well as to obtain favorable tax treatment by deducting such fringes as an operating expense. See, generally, Allen, *Fringe Benefits: Wages or Social Obligation* (1964), pp. 37-42. Many of the self-serving justifications offered by Petitioner herein for denying such benefits to a significant group of its female employees, such as costs and non-return rates (Pet. Br. pp. 15-21), lose their significance when viewed in the light of such apparently neutral objectives. Since any added costs of equalizing fringe benefits amount to additional tax advantages to the employer and where non-

416 F. 2d 980, 996 (5th Cir. 1969), *cert. den.* 397 U.S. 919 (1970). The discriminatory *operation* of these challenged policies is the key to their invalidity under the Act.

return rates are a function of employee morale and loyalty generated by benefit availability,[11] it is clear that Liberty Mutual's present policies are *not* neutral, but rather are a clear example of stereotypical judgments about women and pregnancy which place a barrier to equal employment opportunity before a protected group under the Act in an "artificial, arbitrary and unnecessary" fashion, *Griggs, supra,* 401 U.S. 431.

B. Discriminatory Impact on Women Generally

The United States Department of Labor has found that over half of the women who work do so out of compelling economic necessity. Most women support both themselves and families; 22% have husbands with annual incomes of between $3,000 and $7,000. See: U.S. Department of Labor: Women's Bureau, *Why Women Work,* 1 (rev. ed. May, 1974); Murray, "Economic and Educational Inequality Based on Sex: An Overview," 5 *Valparaiso* U.L. Rev. 237, 239-241 (1971); U.S. Department of Labor, Bureau of Labor Statistics: "Marital and Family Characteristics of Workers, March 1969," Special Labor Force Report No. 120. In 1972, working mothers comprised 42% of the work force. Of these, approximately 38.3% had children between the ages of three and five. Minority women accounted for 50% of all women working, according to 1970 census statistics.[12]

[11] See, generally, the surveys conducted by Prentice-Hall, *Personnel Management Policies & Practices Report Bulletin,* No. 16 (1973) pointing out that return rates for disabled women following childbirth increase, often dramatically, when the employer makes disability protection available to them. See also, "Pregnancy Classifications," *supra,* 75 *Col. L. Rev.* at 478-479.

[12] These statistics appear in Hunt, Report and Recommendations for the Office of the Secretary, Department of Health, Education & Welfare: "Occupational Health Problems of Pregnant Women" (April 30, 1975), p. 9. 43% of the total American female population was working in 1970.

In 1970, the annual wage of such women was 60% of that earned by men.[13] U.S. Department of Labor: Women's Bureau, *Fact Sheet on the Earnings Gap* (rev. ed. 1972). Working women heading families in 1972 had median earnings of $4,140 per year. Nearly one-third of the families headed by women are minority families, yet median earnings of these women in 1972 were $3,370, as compared to $4,460 for families headed by white women.[14] In *Kahn* v. *Shevin*, 416 U.S. 351, 353 (1974), this Court took note of the fact that "the job market is inhospitable to the woman seeking any but the lowest paid jobs." This recognition underscores the devastating impact that employer policies such as Liberty Mutual's have upon women who become disabled by pregnancy by adding additional burdens to existing economic inequities they already face.

Not only are women paid less than men, but their opportunities for advancement are far less, and they are substantially more likely than men to be underutilized in the jobs they hold.[15] A study of Bell System employment practices conducted in 1971[16] indicated that 80% of its female employees hold job classifications with a basic annual wage of less than $7,000, as compared to only 4% of its male employees. On the other end of the wage scale,

[13] This disparity has not diminished in more recent years. The median income of men working full-time in 1973 was $11,468, compared to $6,488 for women. See U.S. Department of Commerce, "Consumer Income," Series P-60 No. 93 (July, 1974), Table 2.

[14] These statistics appear in Hayghe, "Marital and Family Characteristics of the Labor Force in March 1973," *Monthly Labor Review* (April 1974), p. 21, 24-27. Minority women hold a greater percentage of low-skilled, low-paying jobs than white women and have an unemployment rate more than twice as high.

[15] See, generally, U.S. Department of Labor: Women's Bureau, *Underutilization of Women Workers* (rev. ed. 1971). Waldman & McEaddy, "Where Women Work—An Analysis By Industries and Occupation," *Monthly Labor Review*, May 1974, p. 3.

[16] Equal Employment Opportunity Commission Report, "A Unique Competence: A Study of Equal Employment Opportunity in the Bell System" (1971) (herein "Copus Report"), pp. 59-60.

only 3% of the System's women earned $13,000 per year or above. It found that "Bell's incumbent female employees, given their age, education and experience, are paid an aggregate of $500 million per year less than males with comparable personal characteristics." Copus Report, pp. 174-176.

C. Discriminatory Impact on Women in the Bell System

The operation of Bell System policies which deny employment benefits and rights to women disabled by pregnancy demonstrates the broad impact of such policies upon the employment rights of female employees.

Women disabled by pregnancy within the Bell System have their employment rights limited in the following ways, not experienced by any other disabled employee:

1. They receive no income protection under the Plan during any part of their disability period. Unlike other disabled employees, a non-pregnancy-related disability (such as a broken leg) which occurs during the disability absence is not covered. A male disabled for any reason receives protection for the second disability.[17]

2. They do not accrue service credit (seniority) beyond 30 days, regardless of the length of actual disability. They accrue no wage progression credit (credit toward promotion and advancement). Even if a disability arises during leave which would otherwise be covered under the Plan, no service credit is given.

[17] Even Liberty Mutual does not preclude such non-pregnancy-related disabilities from coverage. See Pet. Br., pp. 15-16, n. 26. Failure to make any payments whatsoever to female employees absent due to pregnancy disability must be contrasted to the Bell System policy of making differential payments (as well as granting seniority) to employees (generally male) absent for military service. Whether or not such a policy is desirable, it shows an employer's willingness to accommodate probable exigencies in lives of working men, while refusing to accommodate a predictable exigency in the lives of working women.

Retention of service credit has great significance to a Long Lines employee: seniority affects pension plan rights, entitlement to permanent promotion, vacation eligibility, transfer opportunities, susceptibility to lay-offs or termination, as well as the amount of disability benefits an employee receives for a covered disability. Seniority even affects eligibility for inclusion in the company's Upgrade and Transfer Plan adopted pursuant to the Consent Decree entered into between EEOC and Bell System employers to correct some of its discriminatory practices against women and minorities. See, *E.E.O.C.* v. *A.T.&T. Co.*, 365 F. Supp. 1105 (E.D. Pa. 1973), *mod. o. o. g.* 506 F. 2d 735 (3d Cir. 1975); Copus Report, *supra.*

3. They must pay the cost of remaining within the company's Basic Medical Expenses Plan during the period on maternity leave.

4. They must obtain an Application for Leave of Absence at least sixty days prior to the date when termination of active employment appears desirable, although notice of disability protected by the Plan need only be given at time of absence. At least nine companies or departments required pregnant employees to leave work at the seventh month of pregnancy until 1971. The requirements that application for leave be made by the seventh month may continue, in effect, a substantially mandatory leave date at the end of the seventh month, regardless of the woman's ability and desire to continue to work.

5. A Bell System policy existed at least until June, 1971 which did not assure re-employment following maternity leave, and, moreover, required the woman to agree that her application for leave be considered a voluntary termination of employment in the event that she was not re-employed. Reinstatement is assured to other disabled employees. See, generally, Copus Report, pp. 148-150.

6. The Bell System, unlike Liberty Mutual, claims to cover complications of pregnancy (i.e., toxemia, ectopic pregnancy and pre-eclampsia) under the Plan. However, these disabling conditions qualify for coverage *only* if the employee has not already left her job. Once classified as "inactive" by the employer, no complication of pregnancy, however serious or life-threatening it may be, is covered. In view of the fact that ten percent of all pregnancies may encounter disabling complications, neither Liberty Mutual nor the Bell System are conforming to the mandate of law in this area. *Cf. Aiello,* 417 U.S. 489-490.

In short, women *are* disabled by normal pregnancy and childbirth and may be additionally disabled by complications of pregnancy, in the same manner as men are disabled by other conditions. To justify disparate treatment of pregnancy-related disabilities because pregnancy is a condition unique to women, may satisfy Fourteenth Amendment standards of reasonableness in construing a State's social welfare programs, but it cannot be said to justify an employer's fringe benefit policies where other "unique" conditions, inextricably linked to race, sex or national origin, are covered. Petitioner concedes (Pet. Br. pp. 15-16, n. 26) that refusal to cover the unique condition of sickle-cell anemia would amount to effecting a "pretext for invidious discrimination," but contends that the expense of covering pregnancy disability justifies its exclusion. This contention, of course, answers the Question Presented in the affirmative, but offers a cost or "business necessity" defense to the discriminatory policies.

D. Exclusion of Pregnancy from Employment Disability Programs Fails to Provide Aggregate Risk Protection

The discriminatory operation of Petitioner's disability benefits program not only fails to meet the Title VII analysis of *Griggs,* but also fails to provide aggregate risk

protection found to exist in *Aiello*. Liberty Mutual contends that its disability income protection plan does not differentiate on the basis of sex in terms of "aggregate risk protection" because each employee is "protected from the same risks." However, it has established a program of employee benefits which insures them against the risks of *disability*, not the risks attendant to particular conditions. Like the Bell System, General Electric and other employers whose exclusion of pregnancy from disability protection programs is being challenged under Title VII, the relevant aggregate risk insured is *inability to work* and the resulting need for financial assistance and job protection during that period of time.

Liberty Mutual contends that it does not cover a number of causes of such disability[18] but that, of the causes which are covered, men and women are equally protected when they occur. While it may be argued that an employer may reasonably elect to remove some causes of disability from the scope of a disability benefits plan, the inquiry under Title VII is whether it may elect to exclude a cause which is exclusively suffered by women. Disabilities caused by pregnancy and childbirth are not only unique to women, but constitute a fairly predictable number of disability absences during a given period.

In *Aiello*, this Court found that equal aggregate risk protection meant that the fiscal and actuarial benefits of the program accrued to members of both sexes. 417 U.S. at 496-497, n. 20. Liberty Mutual has made no showing that

[18] Liberty Mutual's Brief (p. 4) notes that certain causes of disability experienced by both men and women are excluded, such as those caused by attempted suicide, self-inflicted injury or cosmetic surgery. The Bell System, like General Electric, covers these disabilities as well. Stipulations of fact admitted at trial in the *Gilbert* case found that these disabilities occur in a statistically small segment of the employee population, 375 F. Supp. at 374.

the actuarial benefits of its present program accrue to women equally with men. Like the Bell System, no evidence is offered as to present costs or dollar benefits of the program, although a substantial amount of attention is given to the claimed differences between men and women in terms of the percentage of benefit claims made compard to their percentage in the work force. *Cf. Aiello*, 417 U.S. at 497, n. 21.

Liberty Mutual devotes substantial attention in its brief to the claimed "equal contributions" (Pet. Br., pp. 8-9, 11-15) to the benefits program, arguing that the costs paid by all employees are the same, without regard to gender. Whether or not contributions to support the disability benefits program are equal is irrelevant in considering whether the coverage of the program has been structured so as to exclude a significant group—all necessarily women—from its benefits.[19]

As distinguished from *Aiello*, the disability benefits plan herein arises directly out of the relationship between an employer and its employees where the critical concern is what happens to an employee—loss of his or her income, ability to obtain hospitalization and medical coverage and protection of job rights such as seniority—when he or she is unable to work. Given this purpose, acknowledged

[19] The "equal contributions" argument, in fact, demonstrates the discriminatory nature of the program. If men and women contribute equally for protection against the risks of disability, then women are *not* receiving equal protection. Men are covered for 100% of their risks of disability and women for less than 100%, since pregnancy is such a risk. Eliminating from coverage, for both men and women, such risks as attempted suicide which are neither statistically significant nor predictable, but suffered by both men and women, does not diminish the fact that Petitioner has failed to provide to women alone protection for a sex-unique disability, but has not made a similar exclusion for male employees.

by the Court below, 511 F. 2d at 206, excluding a substantial group of employees—all women—does not serve the needs or objectives of the program. Because of their inferior economic status, women are more likely to need the protection of a disability income protection program than men. In this context of an employer's decision to protect its disabled employees from the risks attendant to their inability to work, Liberty Mutual does not provide aggregate risk protection. Such a program similarly does not serve the needs or objectives of Title VII which is aimed at insuring that women are not disfavored in benefits or other terms and conditions of employment.

II.

The Mere Invocation of Costs Cannot Be a Defense To Failure To Affording Equal Benefits To Women Disabled By Pregnancy.

A. The Title VII Defense of Business Necessity Does Not Include the Defense that an Increase in Costs Will Justify a Policy Which Discriminates Against a Protected Group.

The courts below found that costs of providing equal benefits to women disabled by pregnancy were not a defense under Title VII.[20] Indeed, although this court in *Aiello* found that the State's concern for the fiscal integrity of its insurance program provided a sufficiently reason-

[20] The Court gave deference to EEOC Cost Guidelines, 29 C.F.R. 1604.9(e), 511 F.2d at 206. Other Courts holding disparate treatment of women disabled by pregnancy to be violative of the Act have also relied upon these Guidelines. See, e.g., Gilbert, *supra*, 375 F. Supp. at 382; *Zichy* v. *City of Philadelphia*, 392 F. Supp. 338, 345 (E.D.Pa. 1975); *Dessenberg* v. *American Metal Forming Co.*, 8 FEP Cases 290, 292-293 (N.D. Ohio 1973).

able[21] justification for its decision to exclude pregnancy coverage, the fact is that Title VII's direct and positive focus on problems of employment discrimination does not permit fiscal concerns to carry such justification weight.

As this court noted in *Griggs*, Title VII's "touchstone" in determining whether to sustain discriminatory practices is "business necessity," 401 U.S. at 431. This defense was described by the Second Circuit in *U.S.* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 662 (2nd Cir. 1971), as meaning more than simply serving "legitimate management functions." In *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 796-800 (4th Cir. 1971), *cert. dism.* 404 U.S. 1006 (1971), the test was framed as requiring a three-step analysis: (a) the business purpose must be "sufficiently compelling" to override the impact on a protected group; (b) the present policy must, in fact, carry out the purpose it is claimed to foster; (c) there must be *no* acceptable alternative policy which would better accomplish the purpose, or accomplish it equally well with a lesser disparate impact.[22] See also *Gilbert, supra,* 10 FEP Cases at 1205-1206 and n.21.

As the court below noted, the business purpose of Liberty Mutual's income protection plan was to "help employees through the financially difficult times caused by illness," 511 F. 2d at 206. Since this purpose is not served by excluding a definable group of women from such help, and

[21] The presumptions of validity and deference to police power decisions which attach to legislative judgments under Fourteenth Amendment jurisprudence [e.g., *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970)] do not exist under Title VII which imposes far more stringent burdens on employers and pays little thought to motives. The court below recognized this critical distinction, 511 F. 2d at 203.

[22] See also, *Local 189, United Papermakers & Paperworkers* v. *United States, supra,* 416 F. 2d at 989; *Sprogis* v. *United Air Lines, supra,* 444 F. 2d at 1201.

Liberty Mutual having failed to show either that an alternative policy could not accomplish this purpose in a non-discriminatory fashion, or that the increased costs are "sufficiently compelling" to excuse them from doing so, costs should not be accepted as a defense to these policies.[23]

The EEOC, along with various state fair employment practices agencies, has thus declared that mere finances will not excuse discrimination. 29 C.F.R. §1604.9(e) provides that an employer may not seek to justify discrimination between men and women with regard to fringe benefits on the basis that "the cost of such benefits is greater with respect to one sex than the other." This guideline, relied upon by the courts below, clearly furthers Congressional intent in ordering the elimination of stereotyped generalizations about protected groups which operate as a barrier to full employment. Identical guidelines govern comparable state legislation. See, e.g., New York Division of Human Rights Rulings on Inquiries § 16.G, p. 29; Maryland Sex Discrimination Guidelines, 820.08(e).

If the mere assertion of expensiveness could be used to avoid compliance with the Act, few discriminatory practices would ever be struck down.[24] Unless Liberty Mutual can sustain the full burden of proof imposed in establishing

[23] The same analysis applies to Liberty Mutual's attempt to justify its maternity leave policies on the basis of a claim that most women do not return to work following childbirth. As this is based upon "stereotyped characterizations" of women which makes "no provision for considering individual capabilities," the court below correctly rejected it, 511 F. 2d at 208. *Cf. Cleveland Board of Education* v. *La Fleur, supra; Gilbert, supra,* 10 FEP Cases at 1205-1206, n.21.

[24] Courts have held that the costs of equal treatment of pregnancy disability, whatever they may be, are insufficient to save discriminatory policies, particularly where the employer has not even considered alternative methods of coverage. See *Gilbert,* 375 F. Supp. at 367.

the business necessity defense, costs alone are insufficient to uphold these challenged practices.[25] Failing to do so, the courts below correctly rejected Petitioner's claimed defense.

B. The Public Policy of Non-Discrimination Precludes Justifying Discriminatory Practices in Terms of Costs.

As the court below noted, Title VII was specifically directed at assuring equality of employment opportunities, 511 F. 2d at 204. The policy of this nation has thus been set by Congress, acting through its Commerce Clause power. That policy makes it unlawful to do business in a manner which discriminates against women, as surely as against minorities. As in many other areas of the law, the financial burdens of doing business in a legal manner are often far greater than those involved in shading or avoiding legal obligations, but public policy precludes that excuse.[26] This is particularly true where the policy furthered is one of eliminating discrimination.

1. *Discrimination*

Courts have firmly rejected arguments of costs in defense of racially discriminatory practices of all kinds. In the area of public accommodations, it is clearly established that the cost of conforming to law cannot be a defense to racial discrimination. In *U.S. by Katzenbach* v. *Gulf State Theatres, Inc.* 256 F. Supp. 549, 552 (D.C. Miss., 1966) a

[25] It obviously increases employer expenses to outfit women with police uniforms and equipment, but no court would uphold exclusion of women from law enforcement agencies on such grounds. Similarly, testing validation, restroom facilities and training programs may cost more, but refusals to provide these items for women would violate the Act, notwithstanding.

[26] *Cf. Potlatch Forests, Inc.* v. *Hays,* 318 F. Supp. 1368, 1375 (E.D. Ark. 1970), *aff'd.* 465 F. 2d 1081 (8th Cir. 1972): "federal labor legislation enacted over the last thirty odd years has placed many onerous burdens on employers."

theatre owner argued that excluding Negroes was "purely economic, i.e. Negroes are unacceptable to the non-Negro patrons upon whose continued support the business depend[ed]." However, the court found the only pertinent issue to be the fact that "Negroes are admittedly excluded" and since this "the law forbids", the discriminatory practices were enjoined. This Court reached the same conclusion in *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 260, (1964), interpreting 42 U.S.C. 2000a, holding that a claim that economic loss would occur if blacks were allowed to rent rooms in the motel, was "of no consequence since this Court has specifically held that the fact that a 'member of the class which is regulated may suffer economic losses not shared by others . . . has never been a barrier' to such legislation." The defense of increased costs as a rationalization for practices which perpetuate racial inequality has also been properly rejected in the area of public education. See, e.g., *Swann* v. *Charlotte-Mecklenburg Board of Education,* 306 F.Supp. 1299, 1312 (W.D. N.C. 1969); *Goss* v. *Board of Education, City of Knoxville, Tenn.,* 482 F.2d 1044, 1046 (6th Cir. 1973), *cert. den.* 414 U.S. 1171 (1974); *Cato* v. *Parham,* 297 F. Supp. 403, 411 (E.D. Ark. 1969).

This court, construing the Equal Pay Act, 29 U.S.C. §206(d) in *Corning Glass Works* v. *Brennan,* 417 U.S. 188 (1974), found no justification for base pay differentials between women on a day shift and men on a night shift, despite the fact that the employer saved money:

> [t]he differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which *Corning* could pay women less than men for the same work. *That the company took advantage of such a situation may be understandable as a matter of economics, but its*

> *differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.*[27] (Emphasis added.)

If it costs more to provide fringe benefits to employees without regard to their sex,[28] then that is simply the price which the law exacts to eradicate discrimination from the marketplace.

2. *Other Areas of Law*

Just as our commitment to equal rights precludes justifying discriminatory practices on the basis of the financial convenience of those who discriminate, our policies in other areas have rejected fiscal defenses, or ordered com-

[27] Although in the context of damages, courts awarding back pay for discrimination under Title VII do so without regard to an employer's good faith or economic situation. See, e.g., *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F. 2d 1364, 1377, n.37, 1380 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.,* 494 F. 2d 211 (5th Cir. 1974); *Albemarle Paper Co.* v. *Moody,* —— U.S. ——, 45 L.Ed 2d 280, 296-297 (1975). "Parties who operate an unlawful hiring arrangement or practice do so at their peril," *Yuba v. Consolidated Industries, Inc.,* 136 N.L.R.B. 683, 688 (1962). This concept includes claims of fiscal considerations. Petitioner has engaged in massive sex discrimination over the years. See 372 F. Supp. at 1149-1155; 508 F. 2d 239. The money it has saved through such practices must be balanced against any costs arguments it now raises. The Bell System, for example, was estimated to have saved over $500 million dollars each year due to its sexually discriminatory employment practices. Copus Report, pp. 175-176. All such employer claims of fiscal inconvenience must be viewed in the light of the monies they have saved in the past by violating the Act.

[28] The *Gilbert* court recognized that "at the core of any suit alleging discriminatory 'compensation, terms, conditions or privileges of employment' are dollars and cents," 375 F. Supp. at 382, but declined, as did the courts below, to find this a viable defense. This result has been reached in other cases involving fringe benefits unrelated to pregnancy disability. See, e.g., *Rosen* v. *Public Service Elec. & Gas Co.,* 477 F.2d 90 (3d Cir. 1973) (pension benefits); *cf. Bowe* v. *Colgate-Palmolive* (Christmas bonuses and vacation pay), 489 F.2d 896 (7th Cir. 1969).

pliance with the law despite economic hardships. For example, in the area of antitrust, courts have put the Congressional goal of protecting free business competition from the unlawful restraints of trade above arguments that the specifics of such enforcement will be too costly. This Court has affirmed this basic principle many times. See, e.g., *United States* v. *Crescent Amusement Co.*, 373 U.S. 173, 189 (1944): "[D]issolution of the combination will be ordered. . . . Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." See also *International Boxing Club* v. *United States,* 358 U.S. 242, pp. 256-260 (1959). In *U.S.* v. *E.I. DuPont & Co.*, 366 U.S. 316 (1961), a partial divestiture order of the district court was reversed, which had focused on "economically oppressive", harsh income tax consequences to shareholders of DuPont and General Motors, and possible capital financing problems, *U.S.* v. *E.I. DuPont de Nemours,* 177 F. Supp. 1, 17-18, 35 (D.Ill. 1959). This court found that "[T]he key to the whole question of an antitrust remedy is . . . the discovery of measures effective to restore competition" and that "courts . . . are required to decree relief effective to redress the violations whatever the adverse effect of such a decree on private interests." 366 U.S. 316, *supra,* at 326. Thus, where drastic remedies, including that of divestiture, are needed to effectuate antitrust policies, such relief will not be denied because economic hardship, no matter how severe, will result. See also, *United States* v. *Corn Products Ref. Co.*, 234 F. 964 (S.D. N.Y. 1916) *app. dism.* 249 US 261 (1919); *United States* v. *E.I. DuPont de Nemours & Co.*, 188 F. 127 (D.Del. 1911); *In re Crown Zellerbach Corp.*, CCH Trade Reg. Rep. 1957-1958 Paragraph 26, 923, at p. 36, 462 (FTC 1958). *Cf. Commonwealth Edison Co.* v. *Allis-Chalmers Manufacturing Co.*, 245 F. Supp. 889, 943. (N.D. Ill. 1965), rejecting as immaterial the defense of "economic coercion", noting that such a defense "reduced to its essentials, is a contention that if a [a business] can grow by violating the antitrust laws, then it has the right to violate those laws and injured customers be damned."

C. The Cost Defense Is Irrelevant In Light of Employer Motives For Affording Disability or Other Fringe Benefits.

This Court in *Aiello* found that California's objective in establishing the contributory insurance program was to insure most risks by distributing available resources in a way which assured solvency and "permitted low income employees to participate with minimum personal sacrifice." 417 U.S. at 494. In short, fiscal needs were at the heart of the legislative judgment involved. In the employment context, employer motives are very different. Cost claims are merely excuses for differential treatment, not the rationale of fringe benefit availability, nor a limiting aspect of altruistic intentions.

Liberty Mutual has completely failed to produce any explanation for its policies except to claim that its expenses of doing business will increase. This Court should apply the same salutory rules to such a claim as it has to similar claims in other areas of the law.[29]

The claim that *Aiello* holds that increased costs of providing such benefits are a sufficient reason to justify re-

---

[29] See, e.g., *Goldberg* v. *Kelly*, 397 U.S. 254, 266 (1970); *Bowles* v. *Willingham*, 321 U.S. 503, 518 (1944); *cf. Weinberger* v. *Weisenfeld*, —— U.S. ——, 43 L. Ed.2d 514 (1975), holding that 42 U.S.C. 402(g) unlawfully deprived female wage earners of equal Social Security Act death benefit protection for their families. The added costs to the Government in equalizing such protection are clear. See also *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969); *cf. James* v. *Strange*, 407 U.S. 128 (1972).

moving one group of employees[30] from coverage is thus misplaced. The court below, like others which have rejected the employers' cost claims, found that "employers offer disability insurance plans to their employees to alleviate the economic burdens caused by the loss of income and the incurrence of medical expenses that arise from inability to work," 511 F.2d at 207. However, as noted at pp. 12-13, *supra,* employers gain substantial advantages from affording this protection, by attracting competent employees, instilling loyalty and building morale, thereby increasing productivity, and, hence, profits. These selfish interests expose the real flaw in all employer cost defenses.

A state's decision to protect disabled workers by administering a contributory insurance plan (or providing welfare aid to poverty-line families) has no selfish motives of this type. Thus, the *Aiello* decision's concern with State fiscal objectives cannot be compared to the decisions below. States do not establish social welfare programs in a competitive setting with other states to attract recipients. The origin and purpose of employer fringe benefits programs, however, is a direct function of economic competition with other employers for the labors of qualified and loyal employees. See Allen, *Fringe Benefits, supra.* Thus, it may have been appropriate under Fourteenth Amendment standards of review, for the *Aiello* decision to focus on California's possible costs, because the costs of the insurance program were central to its objectives of keeping contributions at a minimum to aid those workers at the low end of the income scale, 417 U.S. 496. However, employer objec-

[30] *Aiello's* Footnote 20, 417 U.S. at 496-497, notwithstanding, Liberty Mutual has not set up a program which distinguishes non-pregnant and pregnant persons. It has excluded from benefits a sub-class of women who are similarly situated, i.e., *disabled,* to those receiving benefits. *Cf. Phillips* v. *Martin-Marietta Corp., supra.* The court below so found, 511 F.2d at 206.

tives in providing fringe benefit coverage are unrelated to costs and the assertion of costs as a defense must be rejected.

III.

Objective Statistics Demonstrate That Probable Costs of Providing Equal Benefits To Women Disabled By Pregnancy Are Not As Great As Claimed and Would Not Be Sufficient To Satisfy Title VII Business Necessity Standards.

Liberty Mutual's failure to provide equal employment benefits to women disabled by pregnancy is a direct function of the amount of money claimed to be necessary to do so. Insofar as it did not introduce any substantive data on claimed costs below, it relies upon briefs of *amici* and other materials which are alleged to show that costs are prohibitive. However, data regarding probable costs has been prepared by more objective sources which shows that any increase would be a negligible percentage of an employer's total compensation costs and thus inadequate under the business necessity standards discussed in Point II, *supra.* Further, the decision of many private employers to cover women so disabled, underscored by similar decisions by Congress, federal agencies and other nations, demonstrates that costs cannot be as substantial as Petitioner claims.

A. The Bell System Statistics

The Bell System has presented to the Court a study submitted to the Office of Federal Contract Compliance in opposition to its proposed Guidelines on Sex Discrimination, 41 C.F.R. §60-20.3, which include a requirement for equal treatment of women disabled by pregnancy which is identical to the EEOC Guidelines, 29 C.F.R. 1604.10. This study

is alleged to represent the experience of the Bell System under its Plan, suggesting (1) that women already receive a disproportionate percentage of the benefits conferred under the Plan compared to their numerical representation in the work force; (2) that coverage of pregnancy disability will increase this disparity; and (3) that enormous expenses will result from such coverage.

In reciting the present "disproportionate benefits advantage" received by Bell System women, due to claimed rates of frequency and severity of female disability absences, no mention is ever made of the present costs of such coverage. Such an omission is startling, particularly where the study contains estimates of how much it would cost to cover pregnancy disability.[31] It is apparent that the Bell System is in a position to make such calculations; thus, it may be presumed that it has done so, and that the costs presently paid to men and women disabled under the Plan do not bear out the disproportionate advantage argument. Indeed, some commentators have suggested that if employers were asked to provide definitive data on costs of their expenditures for employee fringe benefits, including disability benefits, these costs would be equal or greater for male employees than for female.[32] Absent any statistics

[31] The estimate of between $15 and $19 million dollars for coverage of pregnancy is based upon an assumed disability period of eight weeks, computed on the basis of the average senority and salary of women taking maternity leave in one company (Br. p. 7, App. 8a-9a). No statistics are present from which it can be inferred that the average seniority of child-bearing age women is two-to-five years system-wide. Further, Xerox Corporation has found that no correlation exists between seniority or age and duration of pregnancy disability. See Hutchinson & Wright, "Pregnancy Disability—Time Duration and Disability Benefit Cost" (Xerox Corp. 1974), pp. 3, 7, 10.

[32] See CACSW, Letter of J. Gutwillig, Chairman to Secretary of Labor, June 27, 1974, p. 2: "There is a strong possibility that if an employer's costs for [fringe benefits] were computed on the basis of actual per capita expenditures in behalf of male and in behalf of female employees that the expenditures for female employees would be less than for male employees."

on Bell System's present costs of providing disability income protection to men and women, this Court should reject the "disproportionate advantage" arguments presented here to support the exclusion of pregnacy disability as a non-discriminatory employer judgment.

In addition, substantial evidence exists to show that frequency and severity of disability is not related to sex, but is related to the nature and type of job one holds. Thus, individuals holding low-paying, less skilled or responsible positions, or "dead-end" jobs are far more likely to be absent from work than other employees. See, e.g., U.S. Department of Health, Education and Welfare, "Time Lost From Work Among the Currently Employed Population, United States—1968", Vital and Health Statistics, Series 10, No. 71, Table B, pp. 5-7. Where employers have traditionally relegated women to such jobs, the rates at which they are absent from work may not be claimed to be due to their sex. This is particularly true of the Bell System's utilization of such an argument, where it has made no showing that these higher frequency and severity rates are not related to the low status and salary received by women in its employ.[33] Xerox Corporation found, for example, that its lower paid female employees tended to have longer disability periods. Hutchinson & Wright, p. 7. A survey of incidence and length of hospitalization for Metropolitan Life Insurance Company employees in 1973 showed that

[33] The Copus Report found, for example, that "the most realistic expectation for women [in the Bell System] is a career that begins and ends in the Operator job. Women with 20, 30 or even 50 years of Bell System service are often still in the entry-level position of Operator." p. 126. See also the findings of the district court below regarding Liberty Mutual's disparity in promotional practices, 372 F.Supp. at 1154-1155, *aff'd.*, 508 F. 2d at 257-259.

men had a greater incidence and length than women. See Gutwillig Letter, *supra,* and annexed Statistical Bulletin Tables. On a nation-wide basis, it has been concluded that days lost by men and women due to disability are roughly equivalent. CACSW, "Women in 1971", *supra,* p. 55. Consequently, the claimed "disproportionate advantage" to women at present is not supported by any competent evidence whatsoever.

The same is true for the argument that a substantial number of women disabled by pregnancy will fail to return to work following the end of the disability period (See Pet. Br., p. 19; Bell System Br., p. 8), thereby making coverage of this disability a form of severance pay. It is questionable that the experience of only one Bell System employer in 1972 possesses any current system-wide accuracy. Even assuming *arguendo* that it does, its report that 48% of the women who took maternity leaves failed to return makes no assessment of the obvious relationship between that fact and the Bell System's policy of denying reinstatement rights to all women returning from such leaves. Clearly such a policy serves to encourage women not to return to work.[34] In fact, employers such as Liberty Mutual, General Electric or the Bell System which perpetuate forced maternity leave policies, unrelated to actual disability, force women to seek employment elsewhere even prior to childbirth since they must

[34] Bell System statistics fail to include any updating following 1972, a time when it is claimed that such policies ceased; again, the absence of more recent statistics may be presumed to be due to the fact that they are not supportive of this argument. Further, the System offers no indication of the number of quits annually by all employees, or the number of women generally who quit due to the absence of any incentive to remain in low-paying dead-end jobs. See, e.g., Copus Report, *supra,* pp. 126-127, which found that 69% of all terminating service representatives in 1970 were dissatisfied with their chances for promotion.

support themselves and their families by some means. Nation-wide, statistics have shown that women are less likely than men to quit their jobs. Armknect & Early, "Manufacturing Quit Rates Revisited: Secular Changes and Women's Quits," *Monthly Labor Review,* December, 1973, p. 56.

It is clear that an employer's benefit policies and reinstatement guarantees will have a substantial impact upon an employee's decision to return following disability absence. Studies of employer treatment of women disabled by pregnancy conducted by Prentice-Hall, for example, demonstrated that rates of return for women disabled by pregnancy increased dramatically when employers began treating that disability equally with others.[35] Prentice-Hall Report Bulletin No. 25, June 6, 1972, p. 463.

An employee who knows that her employment rights (such as seniority, accrual of wage progression credit, pension credit) are being denied or limited during disability, while routinely granted to all other disabled employees, is hardly encouraged to make a special effort to return to her previous employer, especially where her hopes of promotion and advancement are already minimal. As noted in "Pregnancy Classification", *supra,* 75 *Col. L. Rev.* at 476:

> One way to keep mothers at home is to treat them like temporary or less important labor. This can be accomplished in part by excluding them from sick pay, disability benefits for childbirth or both, and then by complicating their reentry into the job market

[35] A woman's link to her job often results in a decrease in the length of her disability claim. Thus, in New Jersey, working women were found to claim less benefits than non-working women insured under the statute. See Gutwillig, Address to American Hospital Assn. Inst., Key Biscayne, Florida (July 27, 1972).

through reductions in their seniority or the provision of unacceptable substitutes for the positions they were forced to leave. Furthermore, women who are 'expected' to leave their jobs when they become pregnant can be encouraged to do so by paying them lower salaries and giving them dead-end jobs.

The statistics introduced by the Bell System, and relied upon by Liberty Mutual in justification of its refusal to cover women disabled by pregnancy, must therefore be discounted as an accurate or reasonable forecast of fiscal problems claimed to accompany this aspect of equal employment rights for women.

B. Insurance Company Statistics

Petitioner, along with two of the *amici* representing its position herein,[36] argues that insurance company statistics should be utilized in assessing the allegedly prohibitive costs of equal treatment of pregnancy disability. In reviewing this data, however, it is critical to keep in mind the fact that these companies, like Liberty Mutual itself, are *employers* covered by Title VII. Thus, their claims of costs cannot be considered objective or neutral. Their interest in convincing this Court that Title VII should not mandate equal treatment of women disabled by pregnancy is no different from that of the Bell System or any other employer.

In addition, the statistics discussed by these insurance companies are not an objective measure of the actual costs such equal benefits coverage would entail. The insurance industry has warned that data on benefit claims and duration of disability which uses sex as the classification factor

[36] American Life Insurance Association and Health Insurance Association of America ("ALIA" and "HIAA") and American Mutual Insurance Alliance.

does not accurately measure disability cause or occurrence. The industry has relied so heavily upon sex-stereotyping in formulating its actuarial data and rate structures that its own representatives have urged complete revision of industry practices.

1. *Insurance Industry Statistics Do Not Present An Accurate Picture of Present Disability Patterns*

In arguing that it costs one and one-half times as much to cover disabled women than disabled men (ALIA Br., p. 26) great reliance is placed upon reports issued by the Society of Actuaries in 1962, 1971 and 1973.[37] All of these Reports rely upon indemnity tabulars prepared for the years *1947-1949*. This fact alone justifies dismissal of these statistics. It is hardly necessary to point out that nearly 30 years ago, the entire economic picture of this country was vastly different from today. Few women worked out of need or otherwise; those who had held jobs during World War II were eliminated from the job market as men returned from the war and reclaimed their positions. The post-war baby boom, the post-war economic boom, and the very different social mores and values which dominated that era in our history form no basis whatsoever for reliable statistics regarding costs, birth rates, claim patterns or employment needs of today's working women.

Further, use of these 30-year old tables as an indicator of present claim patterns is misplaced insofar as factors other than gender are not included within them. Thus, in *Transactions* 1962, p.79, the Society of Actuaries' Reporting Committee cautioned that its tabular ratio charts should be evaluated with "caution" because

[37] These "Reports of Mortality and Morbidity Experience", will be referred to as "*Transactions*" for each respective year. Many *amici* base their cost estimates almost exclusively upon these reports.

> the presentation of Group Accident and Health experience in the form of ratios of actual to tabular claims *is still in the experimental state, with many factors affecting experience not reflected by the tabulars.* For example, the tabulars do not contemplate a variation caused by the age distribution or the geographic location of the employees. (emphasis added)

Actual to tabular ratios (the amount of "standard" [neither high or low risk] indemnity insurance coverage for total covered weekly payroll compared to amount of disability claims actually paid) contained in the 1947-1949 tables are further restricted by reference to employers of an "exposure size group" of $40,000 weekly payrolls.[38] It is clear that employers of the size of Liberty Mutual, the Bell System, or General Electric would have substantially different and lower costs of disability insurance coverage. The 1962 Report notes that the small exposure size group was used "to minimize the effect that jumbo groups might have upon the ratio of actual to tabular claims." *Transactions* 1962, p. 78.

Change in the nature of the working population and the quality of working conditions over the past thirty years has obviously affected frequency and severity of claims in a major way. The Reports take note of nationwide disability statistics which show a negligible difference between men and women in days of disability per thousand,[39] and concede flatly that the tabular ratios "may not reflect current claim patterns." *Transactions* 1971, p.

[38] It is difficult to assess the impact of such a $40,000 weekly payroll limitation upon today's economy and money market figures.

[39] See, generally, "Report of Proceedings of Hearings on Economic Problems of Women," "*Joint Economic Committee of Congress*, Vol. 3 (July 12, 1973), (herein "Report—Economic Problems"), Statement of Barbara Schack, p. 178.

190. Additionally, they note that "maternity tabulars *do not reflect the substantial decline in birth rates in recent years.*" (*Id.*, emphasis added.)

In 1973 the Society reported that age distribution, industry classification and size of particular cases, admittedly relevant factors in determining actual disability experience, were all excluded from these ratios. *Transactions* 1973, p. 271; see also *Transactions* 1971, p. 190.

The statistics relied upon by the insurance companies show merely that when disability costs are analyzed solely in terms of gender, which is concededly not the relevant or proper analytical measure of actual experience, they will show a higher percentage of claims by women for a period thirty years behind us in history. This Court should take into account the significant time differential, as well as the industry's own cautionary remarks, when assessing Petitioner's reliance upon such statistics.

2. *Sex-Based Insurance Classifications Are Actuarially Suspect*

Experts within the insurance industry have repeatedly warned against reliance upon sex-based classifications in determining valid costs of insurance coverage. The "Opinion and Report" of the New York State Superintendent of Insurance (January 28, 1975) (herein "New York Report") found that "insurance companies have engaged in underwriting practices that make numerous distinctions based on the sex of the applicant or policyholder," and that "*such underwriting distinctions emanate from unjustified subjective views of the role of women in our society*" which "are *not derived from objective data.*" New York Report, pp. 2-3, 4 (emphasis added). Pennsylvania's Commissioner of Insurance, testifying before Congress regarding the economic problems faced by women, noted that sex-based classifications were made by the insurance industry as a

matter of "convenience", a "homogenous classification of women" which he found to be lacking in meaning in the face of women's present economic position. He urged the "re-evaluat[ion] of all sex-classifications in the insurance business." [40]

Despite evidence which indicates that age, income level and type of job are far more significant actuarial factors than sex in predicting the amount of benefits employees will claim,[41] Reports of the Society of Actuaries fail to note that their statistics are based upon inaccurate, albeit "convenient", misconceptions about the role of women in the marketplace. The 1962 Report does not, for example, take into account the lower wages paid in largely female industries, nor the relationship of salary and job classification to claims made. Absence of such data is a direct result of industry stereotypes. Pennsylvania's Commissioner testified that most insurance companies "seem to assume that women don't need or want to work, so that disability pay would just be extra income for some women who would really prefer to stay home with the house and children." [42] Their rate differentials are structured accordingly.[43] Despite the negligible difference between men and women in disability days per thousand, for example, the Guardian Life Insurance Company charges women almost three times

[40] "Report—Economic Problems", p. 159. The Commissioner also stated that "[N]onetheless, there are some convenient bases for classification which the insurance industry does not now use. One is color. Although blacks have a shorter life expectancy than whites, no classification based on color is used. Such a classification is considered to be unacceptable from a public policy standpoint."

[41] See California Assembly, Joint Committee on Unemployment Compensation Disability Insurance, Final Report 43 (1966).

[42] "Report—Economic Problems", *supra*, p. 178.

[43] See, e.g., Manual of North American Reassurance Company, stating that "women's role in the commercial world [is] a provisional one." *Id.*, p. 174.

the premium rate charged men for identical disability insurance. "Report—Economic Problems", *supra*, p. 178. Available coverage is also dispensed to women on a differential basis. See *Stern* v. *Massachusetts Indemnity and Life Insurance Co.*, 365 F.Supp. 433 (1973). Many companies restrict women to a two-to-five year benefit period, while offering coverage to men in identical occupational classifications through age 65, or for life. "Report-Economic Problems," *supra*, p. 160. Many companies charge increased premiums to employers with higher percentages of women in the work force regardless of actual disability experience, or age, job classification or salary factors. *Id.*, p. 174.

Sex-stereotyping for the convenience of the insurance industry's rate structures must not be permitted to stand as the basis for assessing real costs of disability coverage for women whether for pregnancy disability or otherwise. As noted by Thomas J. Gilhooly, General Counsel of HIAA:

> Any studies which can lead to a more sophisticated classifications of risks which would at least minimize the sex factor should be encouraged. Certainly, in disability coverage the trend should be toward underwriting the job and not the sex. *The old stereotyped distinctions whether in benefits, underwriting or rating are no longer valid.*
>
> ("Equal Rights and Insurance", *Chartered Life Insurance Underwriters*, Vol. 29, 1975, p. 41; emphasis added.)

In view of the self-serving and generalized nature of their data, to excuse disparate treatment of women in an area as critical as equal employment opportunity because the insurance industry says it will cost more

to comply with the law, without evaluating the basis upon which that claim is made, does incalculable harm to millions of working women who need and want the rights and privileges of employment on the same terms as men. Until the insurance industry can provide cost statistics which accurately measure disability experience of working men and women, and reflect the true picture of women in the job market, their present statistics point out only one thing —it costs more because they say so.[44] This is no basis for restricting the mandate of Title VII.

C. Objective Statistics and Actual Private Employer Experience Show That Anticipated Costs Will Not Be As Great as Petitioner Claims

Whatever the costs of equal treatment of pregnancy disability, the fact is that a substantial number of private employers are able to cover it on the same terms as other disabilities without jeopardizing their business.

In 1972, a detailed study of the practical cost impact of implementing the 1972 EEOC Guidelines was undertaken, using the Federal Reserve Bank of Boston, Massachusetts as the subject employer.[45] This study concludes that alleged cost claims such as those made by Petitioner and its *amici* do not stand up under realistic analyses of relevant employer wage costs.

---

[44] Much of the allegedly supportive statistical-cost data relied upon by the *amici* insurance associations is not even available to the public for analysis. Counsel for CWA requested material cited in these briefs from *amici*, but was told that it was "confidential" and could not be released. This Court should reject data shrouded in claims of secrecy as unsupportive, just as surely as that available for scrutiny which reveals inaccurate and anachronistic methodology.

[45] Greenwald, "Maternity Leave Policy," *New England Economic Review*, January, 1973, p. 13 (herein "Greenwald").

The Bank was selected because it contained a number of factors considered significant in determining probable costs to the average employer of liberalized benefits: it had a large, fairly young female staff, and extremely generous sick leave policies. Greenwald, *supra*, p. 15. The study found that the labor costs of covering women disabled by pregnancy would have risen only by approximately ½ cent per hour in 1971, and ¼ cent per hour in 1972. Greenwald, *supra*, p. 17. Payroll costs were estimated, for ten weeks of pregnancy disability protection, to add $16,945 to disability costs if all the Bank's women disabled by pregnancy in 1971 had been covered.[46] The study concluded that its "examination of the costs of implementing the new EEOC guidelines clearly indicates that the costs would have a negligible impact on overall labor costs." *Id.*, p. 18.

The Greenwald study supports statistics gathered by the United States Department of Labor which indicate that, at the end of 1971, total costs of *all* health insurance and disability compensation for employee disability absence was only 5.5% of total employer wage and salary costs, and show that the costs of covering pregnancy disability are a "fraction of a percent of total wage and salary costs."[47] Statistics introduced in the Gilbert trial, showed that overall employee fringe benefits amounted to 34% of base pay, while disability benefits were 1.8% of base pay. Based upon the number of disabled female employees in 1971-1972, and

---

[46] The study also showed the impact of the declining birth rate. For eight months in 1972, costs of such coverage dropped to $6,907. Similarly, pregnancy accounted for only 4.5% of the Bank's turnover among its female staff in 1972, compared to 12% in 1971.

[47] CACSW, Remarks of J. Gutwillig, Chairman, before American Hospital Association Institute, July 27, 1972, pp. 9-10. Chairman Gutwillig also noted that estimated premiums for a typical hospital employer show that cost of pregnancy disability coverage (prior to deductions for large employers) would be less than $1.50 per month per employee.

a projected six week disability period, it was estimated that covering women so disabled would have amounted to 7% of 1.8% of base pay in 1970 and 4% of 1.8% of base pay in 1971. Even using the Bell System estimate of $19 million dollars to cover women disabled by pregnancy, CWA has found that such a sum in fact amounts to slightly more than one cent per hour and less than one fifth of one percent of the total compensation (wages and fringe benefits) presently paid to all its employees.[48]

[48] These figures are obtained as follows: At the end of 1973, the Bell System employed 818,000 persons. As of June, 1975, the average number of hours worked per week was 38.7. In the 1974 collective bargaining negotiations between the Bell System and CWA, 52.2 weeks per year was agreed to constitute the number of paid weeks of compensation per year (including vacation, holidays and disability). Multiplying the number of paid weeks by the number of hours worked (52.2 x 38.7) equals 2009.7 (2010) as the total annual paid hours per employee. CWA estimates that hourly estimated compensation (salary and fringe benefits) for each employee in the 1975 contract year is $7.50. Multiplying paid hours per year by $7.50 (2010 x $7.50) yields $15,075 as total annual compensation paid by the Bell System per employee. Multiplying the annual paid employee compensation by number of employees ($15,075 x 818,000) amounts to total annual compensation paid by the Bell System (including fringe benefits) to all its employees of $12,331,350,000. The total compensated hours of all employees (number of employees x total paid hours paid per employee per year) equals 1,664,180,000 hours. By dividing the Bell System's claimed $19,000,000 figure for costs of pregnancy disability coverage by total number of compensated hours per employee per year, extension of disability coverage to women disabled by pregnancy amounts to an increase of slightly more than one cent ($.01^{16}/_{100}$) per hour in hourly compensation paid to Bell System employees. Dividing the alleged cost of maternity benefits by the total compensation presently paid by the System to all employees ($12,331,350,000) demonstrates that provision of pregnancy disability benefits amounts to .15 percent, less than one-fifth of one percent, of the total amount of yearly compensation paid by the Bell System to all its employees. Statistics on contract negotiations are obtained from an internal CWA *Report on Major Improvements and Changes Agreed Upon By CWA and A.T.&T. and its Subsidiaries* (August 5, 1974). Statistics on hours worked are reported in U. S. Department of Labor, Bureau of Labor Statistics, "Employment and Earnings," Vol. 22, No. 2, p. 91, August 1975.

These percentages are *not* significant in terms of total employer expenses, and thus fail to qualify as a proper business necessity defense. See Point II, *supra.*

Further, the fact that a significant number of private employers do provide disability coverage to women disabled by pregnancy demonstrates that an employer's fiscal soundness is not jeopardized by doing so. Surveys conducted by the Department of Labor show that nearly half of the employer disability plans analyzed provided some form of disability coverage for pregnancy, most of which are totally employer-funded. Other sources have reached the same conclusion.[49] There is simply no private employer data which supports Petitioner's contention that it cannot protect the statistically predictable number of women in the labor force who become disabled by pregnancy.

D. Congress, Federal Agencies, States and Other Countries Have Determined to Provide Disability Protection to Women Disabled by Pregnancy

The decision of the Court below that unsupported claims of costs could not be a defense to Petitioner's policies, 511 F. 2d at 206, is consistent with the intention of Congress which has rejected such defenses, both directly and indirectly. By requiring specific protection for pregnancy disability in the only temporary legislation it has enacted, 45 U.S.C. 351 (k) (2) of the Railroad Unemployment Insurance Act, and by acquiescence in recent Guidelines issued by the Department of Health, Education & Welfare, which are virtually identical to the EEOC Guidelines, mandating equal treatment of women disabled by preg-

[49] U.S. Department of Labor, *Digest of Health Insurance Plans*, Vol. II (1974 ed.; 1975 supplement). See also, Hutchison and Wright, *supra;* Prentice-Hall Report Bulletin No. 24 (March 26, 1974), p. 459; Society of Actuaries, *Transactions* 1972, No. 2, June, 1972 (190-202); CACSW, Item 20-N (July 2, 1971).

nancy by employer disability plans,[50] Congress has expressed its intention that working women receive equal employment disability benefits. The Civil Service Commission does not provide disability benefits to disabled employees but does mandate that pregnancy disability be treated the same as other disabilities for purposes of sick leave, 5 C.F.R. § 630.401(b). See, generally, Federal Personnel Manual, Supplement 990-2, Sub-chapter S 13 (1974). *Cf. Satty* v. *Nashville Gas Co., supra.*

Similarly, a substantial number of states either have disability coverage for pregnancy under disability insurance or unemployment benefits programs, or require its coverage under state fair employment statutes. In New York, the Human Rights Law, Executive Law, § 297 *et seq.*, was recently construed by a unanimous Court of Appeals as requiring equal treatment of pregnancy disability.[51] See, *Union Free School District No. 6* v. *New York Human Rights Appeal Board*, 35 N.Y. 2d 371 (1974), *rearg. den.* 36 N.Y. 2d 807 (1975). See, generally, "Pregnancy Classifications", *supra*, 75 Col. L. Rev. at 470 n. 155 and 471; Hickey, "Changes in State Unemployment Insurance Legislation," *Monthly Labor Review*, January, 1974, pp. 39, 43-44.

---

[50] Vol. 40 *Fed. Register* No. 108, § 86.57 (June 4, 1975). Congress was empowered to reject these proposed guidelines under the General Education Provisions Act, 20 U.S.C. § 1232, but did not do so. The proposed Office of Federal Contract Compliance Guidelines, *supra*, are identical to HEW Guidelines.

[51] That Court specifically stated that neither *Aiello* nor any adverse Title VII decision in a case such as that at bar would affect an interpretation of this State statute, 35 N.Y. 2d at 377, n.1. This position disposes of the Petitioner's argument that it would be "anomalous" to require private employers to meet a standard of equality that states as insurers may not be required to meet under *Aiello* (Pet. Br., pp. 9-10). The real anomaly would occur if this Court were to find Title VII more restricted than state fair employment laws.

The lack of viability of the costs argument is also aptly demonstrated by the fact that disability programs have been established in every industrialized nation except the United States which provide benefits to women disabled by pregnancy.[52] At least 70 countries, with far less resources than the United States, have thus determined that economics do not justify limiting the rights or restricting the employment needs of working women.

CONCLUSION

The decision below is in accord with those of five other Circuits and numerous district courts,[53] finding that Title VII's ban on sex discrimination in employment does not end when working women become pregnant. This Court should affirm the Court below in all respects. By so ruling, the Court has a unique opportunity to end stereotypical judgments about the fundamental role which women play in our society. This Court should firmly reject the

---

[52] See, e.g., U.S. Department of Labor: Women's Bureau, Bulletin No. 240, "Maternity Protection of Employed Women"; U.S. Department of Health, Education and Welfare, "Social Security Programs Throughout the World, 1971," Research Report No. 40 (1971); Mead & Kaplan, *American Women* (1965), p. 63.

[53] *Communications Workers of America* v. *A.T.&T., Long Lines Dept., supra* (2d Cir.); *Gilbert* v. *General Electric Co., supra* (4th Cir.); *Satty* v. *Nashville Gas Co., supra* (6th Cir); *Farkas* v. *South Western City School District*, 8 FEP Cases 288 (S.D. Ohio 1974), *aff'd.* 506 F.2d 1400 (8th Cir. 1974); *Holthaus* v. *Compton & Sons, supra* (8th Cir.); *Sale* v. *Waverly-Shell Rock Board of Educ.*, 9 FEP Cases 138 (N.D.Iowa 1975), *leave to app. den.*, —— F.2d —— (8th Cir. Jan. 31, 1975, Misc. No. 75-8088); *Hutchison* v. *Lake Oswego School Dist., supra* (9th Cir.); *cf. Cedar Rapids School Dist.* v. *Parr*, 6 FEP Cases 101 (D.Iowa 1973); *Dessenberg* v. *American Metal Forming Co., supra; cf. Lillo* v. *Plymouth Board of Education*, 8 FEP Cases 21 (N.D. Ohio 1973); *Scott* v. *Opelika City Schools*, 63 F.R.D. 144 (M.D. Ala. 1974); *Vineyard* v. *Hollister Elementary School Dist.*, 64 F.R.D. 580 (N.D. Cal. 1974); *Zichy* v. *City of Philadelphia, supra.*

argument that compliance with our national commitment to equal rights in employment may be excused simply because it *may* cost more to provide men and women with equal terms and conditions of employment. The Court should set aside unfounded or biased claims of employer cost and take note of objective statistics which show that protection of women disabled by pregnancy is a *fraction* of overall employer compensation costs. The Court should examine employer objectives served by the establishment of fringe benefit programs, and review these policies in light of such objectives. Employers should be reminded that the business necessity defense to practices challenged under Title VII requires that such practices be substantially related to these objectives, *not* to mere fiscal or management preferences, and to proof that *no* alternative exists which would serve these objectives without effecting a disparate impact upon groups protected by the Act.

In light of employer fringe benefit objectives, excluding women disabled by pregnancy from the scope of benefits programs designed to protect all disabled employees fails to provide aggregate risk protection to women. The experience of private employers who do protect women so disabled, as well as the policies of numerous states, nations, Congress and federal agencies, demonstrates that we need not deprive working women of an equal share of the rights, benefits and privileges of employment. This Court should firmly hold that it is sex discrimination to exclude women from this equal share, and that Congress has forbidden such exclusion by its enactment of Title VII.

The judgment below should be affirmed.

Dated: New York, New York
September 22, 1975

Respectfully submitted,

Mary K. O'Melveny
Jonathan W. Lubell
H. Howard Ostrin
1370 Avenue of the Americas
New York, New York 10019
(212) 757-4000

Charles V. Koons
1100 Seventeenth Street, N.W.
Washington, D. C. 20036

Attorneys for
Communications Workers of America,
AFL-CIO, as Amicus Curiae•

• *Amicus* appreciates the assistance of Margaret M. Brown, J.D. Rutgers Law School, 1975, in the preparation of this Brief.

Supreme Court, U. S.
FILED
SEP 22 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 74-1245.

LIBERTY MUTUAL INSURANCE COMPANY,
PETITIONER,

v.

SANDRA WETZEL AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief of Amici Curiae Commonwealths of Massachusetts and Pennsylvania, States of Florida, Maine, Michigan, Missouri, Wisconsin and Vermont.

FRANCIS X. BELLOTTI,
Attorney General of Massachusetts,
BARBARA J. HOUSE,
Assistant Attorney General,
TERRY JEAN SELIGMANN,
Assistant Attorney General,
373 State House,
Boston, Massachusetts 02133.
(617) 727-2238.
Attorneys for the Amici.

Of Counsel:
THOMAS MILLER.

BATEMAN & SLADE, INC., BOSTON, MASSACHUSETTS.

Table of Contents.

Interest of the amici curiae 1

Opinions below 2

Jurisdiction 3

Statute involved 3

Question presented 3

Statement of the case 4

Summary of argument 5

Argument 6

I. The Company's policy denies women equal employment opportunities guaranteed to them by Title VII 6

II. The Company's exclusion of pregnancy from its income protection plan is sex discrimination within the meaning of Title VII 10

A. EEOC guidelines are consistent with Congressional intent to eliminate all forms of sex discrimination and are entitled to judicial deference 10

B. The Company has not raised any defenses permissible under Title VII which defeat the respondents' case of sex discrimination 15

1. Respondents have established a firm case of discrimination under Title VII 15

2. The Company has not justified its discriminatory policy by raising the defenses permissible under Title VII 19

III. The decision in Geduldig v. Aiello did not reach sex discrimination proscribed by Title VII and therefore it is not dispositive of this case 23

Conclusion 28

Table of Authorities Cited.

CASES.

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 6n

Black v. School Committee of Malden, Mass. Adv. Sh. (1974) 637, 310 N.E. 2d 330 22

Cheatwood v. South Central Bell Telephone & Telegraph Co., 303 F. Supp. 754 (M.D. Ala. 1969) 16n, 17n

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 7n

Communications Workers of America, AFL-CIO, v. American Telephone & Telegraph Co., Long Lines Dept., 513 F. 2d 1024 (2d Cir. 1975), petition for cert. filed, 44 U.S. L.W. 3067 (U.S. June 19, 1975) (No. 74-1601) 13, 18, 25

Dandridge v. Williams, 397 U.S. 471 (1970) 24

Dessenberg v. American Metal Forming Co., 8 CCH Emp. Prac. Dec. ¶9575 (N.D. Ohio 1973) 18n

Diaz v. Pan American World Airways, Inc., 442 F. 2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971) 16n

Eisenstadt v. Baird, 405 U.S. 438 (1972) 10

Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973) 14

Farkas v. South Western City School District, 506 F. 2d 1400 (6th Cir. 1974) 13n, 18n

Frontiero V. Richardson, 411 U.S. 677 (1973) 22

Geduldig v. Aiello, 417 U.S. 484 (1974) 5, 6, 12n, 18, 23, 24, 25 et seq.

Gilbert v. General Electric Co., 375 F. Supp. 367 (E.D. Va. 1974) 9, 20, 21

Gilbert v. General Electric Co., F. 2d (4th Cir., June 27, 1975), 10 CCH Emp. Prac. Dec. ¶10,269, petitions for cert. filed, 44 U.S.L.W. 3067 (U.S. 1975) (Nos. 74-1589, 74-1590) 6n, 9, 13n, 18

Griggs v. Duke Power Company, 401 U.S. 424 (1971) 13, 16, 19

Holthaus v. Compton & Sons, Inc., 514 F. 2d 651 (8th Cir. 1975) 8n

Hutchison v. Lake Oswego School District, 10 CCH Emp. Prac. Dec. ¶10,325 (9th Cir. 1975), aff'g in part, rev'g in part 374 F. Supp. 1056 (D. Ore. 1974) 8n, 10, 13n, 18n, 20, 26

Jefferson v. Hackney, 406 U.S. 535 (1971) 24, 25

Lillo v. Plymouth Board of Education, 8 CCH Emp. Prac. Dec. ¶9510 (N.D. Ohio 1973) 18n

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 19

McGowan v. Maryland, 366 U.S. 420 (1961) 24

Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238 (N.D. Ga. 1973), affirming denial of preliminary injunction, 475 F. 2d 768 (5th Cir. 1973) 13n

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) 13

Rentzer v. Unemployment Insurance Appeals Board, 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (1973) 24n

Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971), petition for cert. dismissed, 404 U.S. 1006 (1971) 19, 20, 21

Sale v. Waverly-Shell Rock Board of Education, 390 F. Supp. 784 (N.D. Iowa, 1975) 21

Satty v. Nashville Gas Co., F. 2d , Civil No. 75-1083, 10 Emp. Prac. Dec. ¶10,359 (6th Cir., Aug. 8, 1975) 7n, 13n, 15, 18n

Skinner v. Oklahoma, 316 U.S. 535 (1942) 10

Smith v. Sol. D. Adler Realty Co., 436 F. 2d 344 (7th Cir. 1971) 18

Sprogis v. United Air Lines, Inc., 444 F. 2d 1194 (7th Cir. 1971), cert. denied, 404 U.S. 991 (1971) 7, 13, 17

Udall v. Tallman, 380 U.S. 1 (1965) 13

Vineyard v. Hollister Elementary School District, 64 F.R.D. 580 (N.D. Cal. 1974) 13n

Wetzel v. Liberty Mutual Insurance Co., 511 F. 2d 199 (3d Cir. 1975), cert. granted, May 27, 1975 (No. 74-1245) 5n, 23

Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 24

CONSTITUTIONAL PROVISIONS.

United States Constitution

Art. I, § 8, cl. 3 26

Fourteenth Amendment 6, 18, 24, 25, 26

STATUTES.

Federal:

Education Amendments of 1972, Title IX, 20 U.S.C. §§1618 et seq. 14n

Civil Rights Act of 1964 (Title VII), 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §§2000e et seq. 3, 4, 5, 6 10, 11, 12 et seq.

28 U.S.C. § 1254(1) 3

42 U.S.C. § 2000e-2(a) (1) 3

42 U.S.C. § 2000e-2(e) (1) 16

42 U.S.C. §§2000e-5, 12 11

State:

Cal. Un. Ins. Code § 2626 (West, 1973) 24n

REGULATIONS AND INTERPRETATIONS.

29 C.F.R. § 800.110 (1967) 14n

29 C.F.R. § 1604.10 (1972) 2

29 C.F.R. § 1604.10(b) (1972) 11n

29 C.F.R. § 1606.1(d) (1972) 14n

EEOC Dec. No. 70-360 (Dec. 16, 1969) (CCH Emp. Prac. Guide ¶6084) 11n

EEOC Dec. No 71-1474 (March 19, 1971) (CCH Emp. Prac. Guide ¶6621) 12n

EEOC Gen. Counsel Opinion Letter G.C. 158-65 (October 12, 1965) 11n

EEOC Gen. Counsel Opinion Letter G.C. 588-65 (January 28, 1966) 11n

Exec. Order No. 11246, 3 C.F.R. 339 (1965) 11n

30 Fed. Reg. 14927 (Dec. 2, 1965) 12n

38 Fed. Reg. 35336 § 60-20.3(h) (2) (Dec. 27, 1973) 14n

39 Fed. Reg. 22237 § 86.47(c) (June 20, 1974) 14n

Massachusetts Commission Against Discrimination Regulations, § 3 (May 24, 1973) 2n

LEGISLATIVE HISTORY.

110 Cong. Rec. 2728 (1964) 7n

110 Cong. Rec. 13,825 (1964) 7n

S. Rep. No. 872, 88th Cong., 2d Sess. 12 (1964) 26

H. R. Rep. No. 1362, 79th Cong., 1st Sess. 1112 (1945) 8n

H. R. Rep. No. 92-238, 92d Cong., 1st Sess. 4 (1971) 12

MISCELLANEOUS.

Brief for EEOC as Amicus Curiae, Geduldig v. Aiello, 417 U.S. 484 (1973) 12n

Brief for Petitioner, Appendix at 3, Liberty Mutual Ins. Co. v. Wetzel, No. 74-1245 4n

Brief for Petitioner at 16, Liberty Mutual Ins. Co. v. Wetzel, No. 74-1245 13n

Emory Family Planning Program, Dept. of Gynecology and Obstetrics, Emory Univ. Medical Center, Atlanta, Georgia, Contraceptive Technology, 1974-75 22n

EEOC First Annual Digest of Legal Interpretation at 22-23 (1966) 11n

1966 EEOC Annual Report 40-42 11n

Hayden, Punishing Pregnancy: Discrimination in Education, Employment and Credit, A.C.L.U. Women's Rights Project (Oct. 1973) 20n

Hayghe, Marital and Family Characteristics of the Labor Force in March 1973, 97 Monthly Lab. Rev. 21 (April 1974) 9n

Jacobson, Women Workers: Profile of a Growing Force, 81 American Federationist 9 (July 1974) 9n

Love's Labors Lost: New Concepts of Maternity Leaves, 7 Harv. Civ. Rights-Civ. Lib. L. Rev. 260 (1972) 20n

Note, Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971) 6n

Novak, Textbook of Gynecology, 8th ed. 1970 23n

1 U.S. Bureau of the Census, Census of Population: 1970, Part 1, § 1, Table 161 2n

Weyand, Baring the Cost of Bearing, 11 Trial 86 (May — June 1975) 7n, 8n, 9n

Women's Bureau, Employment Standards Admin., U.S. Dept. of Labor, The Myth and the Reality (Rev. May, 1974) 7n, 21n

Women's Bureau, Employment Standards Admin., U.S. Dept. of Labor, Twenty Facts on Women Workers, 1 (Rev. June, 1975) 8n

Women's Bureau, Employment Standards Admin., U.S. Dept. of Labor, Women Workers Today 1, 3 (Rev. 1974) 8n

Women's Bureau, Employment Standards Admin., U.S. Dept. of Labor, Who Are the Working Mothers? 3 (Rev. 1972) 9n

Zimmerman, Comment, Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination, 75 Colum. L. Rev. 441 (1975) 20n

In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 74-1245.

LIBERTY MUTUAL INSURANCE COMPANY,
PETITIONER,

v.

SANDRA WETZEL AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief of Amici Curiae Commonwealths of Massachusetts and Pennsylvania, States of Florida, Maine, Michigan, Missouri, Wisconsin and Vermont.

Interest of the Amici Curiae.

The Commonwealths of Massachusetts and Pennsylvania and the States of Florida, Maine, Michigan, Missouri, Wisconsin and Vermont submit this brief by and through their Attorneys General as *amici curiae* pursuant to Rule 42.

The *amici curiae* have pending in their own state courts or human rights agencies approximately 435 cases which involve the issue of the pregnancy exclusion from income protection plans, sick leave, and other types of insurance coverage. Many of these agencies have administrative regulations similar to those of the Equal Employment Opportunity Commission (hereinafter EEOC) Guidelines on Pregnancy and Childbirth. 29 C.F.R § 1604.10 (1972).[1]

The *amici* have a total work force of 17,552,042[2] of whom 6,663,847[3] or 40 per cent are women employed on a full-time or part-time basis. Each commonwealth and state has an interest in assuring equal employment opportunity for all of its citizens and thus submits this brief on behalf of themselves and on behalf of citizens who are or may be affected by the issue before this Court.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Third Circuit is reported at 511 F. 2d 199 (1975). The opinion of the District Court for the Western District of Pennsylvania is reported at 372 F. Supp. 1146 (1974) and its memorandum order (Pet. App. pp. A49-A51), denying the motion for reconsideration filed by petitioner Liberty Mutual Insurance Company (hereinafter "Liberty" or the "Company") is reported at 372 F. Supp. 1163 (1974).

---

[1] *See, e.g.*, Massachusetts Commission Against Discrimination Regulations, § 3, promulgated May 24, 1973. The language of the relevant portions of these regulations is identical to that of the EEOC guidelines.

[2] U.S. Bureau of the Census, *Census of Population:* 1970, Part 1, § 1, Table 161.

[3] *Id.*

Jurisdiction.

The judgment of the Court of Appeals, affirming the judgment of the District Court, was entered on February 11, 1975. A timely petition for writ of certiorari was thereafter filed on April 2, 1975, and granted on May 27, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statute Involved.

Section 703(a) (1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) (1) (hereafter Title VII), provides that:

> "It shall be an unlawful employment practice for an employer —
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin. . . ." (Emphasis added.)

Question Presented.

Does a disability insurance plan, to which employees must subscribe as a condition of employment, violate Title VII if pregnancy-related disabilities are the only sex-unique disabilities excluded from the plan?

Statement of the Case.

Petitioner Liberty Mutual Insurance Company provides a disability income protection plan to its employees as a condition of employment. The employer funds approximately two-thirds of the cost of the plan. This plan provides benefits in the form of income paid to employees for non-occupational disabilities which necessitate an absence of eight or more days.

Employees with less than five years of service receive two-thirds of their salary to a maximum of $150 per week, for 103 weeks, and employees with more than five years of service receive two-thirds of their salary to a maximum of $275 per week up to the age of 65.

The plan covers nearly all short-term and long-term disabilities, including sex-unique disabilities such as prostate conditions and vasectomies, as well as disabilities from voluntary cosmetic surgery or those arising from voluntarily undertaken activities such as drunken driving or skiing. The only sex-unique disabilities excluded from coverage are disabilities "due to pregnancy or any cause related to pregnancy."[4] *Amici* urge that these exclusions constitute sex discrimination within the meaning of Title VII.

In February of 1972 plaintiffs-respondents, on behalf of themselves and all other female technical employees of Liberty Mutual's Claims Department, filed a complaint in the United States District Court for the Western District of Pennsylvania charging that Liberty Mutual discriminated against women in

[4] Liberty Mutual Insurance Company 1970 brochure. Also excluded are disabilities due to "any act of declared or undeclared war, attempted suicide or intentionally self-inflicted injury, or for any disability which does not require throughout its continuance, the regular attendance of a physician licensed to prescribe and administer all drugs and to perform all surgical procedures." Brief for Petitioner, Appendix at 3, *Liberty Mutual Ins. Co.* v. *Wetzel*, No. 74-1245.

violation of Title VII. Discrimination was alleged both in job classifications and promotions, and in compensation and benefits which include the disability income protection plan. All issues except the exclusion of pregnancy from the Company's income protection plan have been resolved or are still pending before the District Court.

The District Court granted summary judgment to plaintiffs on January 9, 1974, on the issue of the Company's exclusion of pregnancy-related disabilities. A motion by Liberty Mutual for reconsideration was denied by the District Court.

The Third Circuit Court of Appeals affirmed the District Court judgment on February 11, 1975.[5] It held that this Court's decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), was not dispositive because Title VII involved statutory interpretation rather than constitutional analysis,[6] and that Liberty Mutual's income protection plan violated Title VII because it treated a protected class of persons in a disparate manner.[7]

Summary of Argument.

This case challenges the exclusion of pregnancy-related disabilities from the Company's income protection plan as a violation of Title VII. Specifically, the exclusion constitutes sex discrimination within the meaning of Title VII because pregnancy-related disabilities are the only sex-unique disabilities excluded from the Company's plan. Disabilities unique

[5] *Wetzel* v. *Liberty Mutual Insurance Co.*, 511 F. 2d 199 (3d Cir. 1975).

[6] *Id.* at 203.

[7] *Id.* at 206.

to men — prostatectomies, vasectomies — are included in the Company's plan.

Respondents have delineated a claim of sex discrimination under Title VII by demonstrating that the Company's policy turns on a sex-based distinction and has a disparate impact on women only. The Company has failed to vindicate its discriminatory policy by raising the business necessity defense or any defense permissible under Title VII.

The decision by this Court in *Geduldig* v. *Aiello*, *supra*, has no relevance to the present case because it concerned an Equal Protection challenge to the validity of a state statute under the Fourteenth Amendment. Title VII reflects Congress' commitment broadly to proscribe all forms of sex discrimination. The judicial standards for evaluating Fourteenth Amendment and Title VII claims are fundamentally different and *Geduldig* must be distinguished on those grounds.

We respectfully submit that the decision of Court of Appeals for the Third Circuit should be affirmed.

Argument.

I. The Company's Policy Denies Women Equal Employment Opportunities Guaranteed to them by Title VII.

Title VII's provisions prohibiting discrimination because of sex are as extensive as those relating to race, religion and national origin.[8] The purpose of Congress in enacting Title

[8] *See Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Gilbert* v. *General Electric Co.*, F. 2d (4th Cir. 1975), 10 CCH Emp. Prac. Dec. ¶10, 269, *pets. for cert. filed*, 44 U.S.L.W. 3067 (U.S. 1975) (Nos. 74-1589, 74-1590); Note, *Developments — Title VII*, 84 Harv. L. Rev. 1109, 1175 (1971).

VII was unmistakably clear: to create a comprehensive statute proscribing all forms of sex discrimination — overt and subtle. As one court cogently put it: "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[9] *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971).

Sexual equality in employment mandates that all barriers to a woman's full participation in the work force be eliminated. An industrial policy which excludes pregnancy-related disabilities from income protection plans has negative economic and social consequences for both the employer and society at large.[10]

A company's interest in assuring job stability and continuity is advanced by the inclusion of pregnancy in its income protection plan. The Company and its *amici* cite statistics which reflect the numbers of women who elect to remain at home after a maternity leave. These statistics are misleading as future indicators of a woman's likelihood to return to work.[11] For years various factors have operated to discourage and even prevent a woman from having an uninterrupted vocational life: mandatory maternity leave,[12] loss of seniority[13] or even

[9] Indeed, Congress rejected an amendment that would have restricted the act to prohibiting only discrimination based "solely" on an employee's sex. 110 Cong. Rec. 2728, 13,825 (1964).

[10] *See generally Trial* 11:86-87, May — June, 1975; Weyand, *Baring the Cost of Bearing*, 11 *Trial* 86 (May — June, 1975).

[11] *Id.*, at 23; *See also* Women's Bureau, Employment Standards Admin., U.S. Dept. of Labor, *The Myth and the Reality*, (Rev. May, 1974).

[12] *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974).

[13] *Satty* v. *Nashville Gas Co.*, F. 2d , Civil No. 75-1083, 10 Emp. Prac. Dec. ¶10, 359 (6th Cir., Aug. 8, 1975).

job position after maternity leave or pregnancy,[14] low-paying, dead-end jobs.[15] As these hurdles to job security and continuity are removed the work expectancy of women will increase because they will have more incentive to remain on the job. One of the major obstacles is the interruption of employment by pregnancy and its attendant problems. Affording a woman coverage during periods of disability due to pregnancy encourages women to return to the job and promotes the employer's interest in retaining a satisfied and loyal employee.[16]

The conjecture that women will take unfair advantage of an extended maternity leave[17] embodies an unjustifiable presumption, rooted in sexual stereotypes, that women have cavalier attitudes toward their jobs, are not the "breadwinners" in their families and so can be left without income during a period of disability. To the contrary, statistics demonstrate that women are working because of a compelling financial need to do so. In 1973, there were 35 million women in the labor force; about 13 million of these women were working mothers.[18] The number of working mothers has increased eightfold since the period preceding World War II; four out of ten mothers

[14] *Holthaus* v. *Compton & Sons, Inc.*, 514 F. 2d 651 (8th Cir. 1975).

[15] Women's Bureau Employment Standards Admin., U.S. Dept. of Labor, *Twenty Facts on Women Workers*, 1 (Rev. June, 1975).

[16] Lester P. Schoene, representing the Committee of the Railway Labor Executives' Association, Hearings on H.R. 1362, 79th Cong., 1st Session, Before the House Committee on Interstate and Foreign Commerce, 79th Cong., 1st Sess., at 1112 (1945).

[17] *Hutchison* v. *Lake Oswego School District*, 374 F. Supp. 1056, 1064 (D. Ore. 1974), *aff'd in part, rev'd in part*, 10 CCH Emp. Prac. Dec. ¶10,325 (9th Cir. 1975). Weyand, *Baring the Cost of Bearing, supra*, note 10, at 87.

[18] Women's Bureau, Employment Standards Admin., U.S. Dept. of Labor, *Women Workers Today*, 1, 3 (Rev. 1974).

were in the labor force in 1971 compared with three out of ten in 1960 and less than one out of ten in 1940.[19] Approximately 20 million of these women are working because they are single, divorced, widowed or have husbands who earn less than $5,000 a year.[20] For these women, the income from their jobs is vital. Work is a serious continuing necessity for them, not a short-term supplementary source in income. In 1970, 33 per cent of all families headed by a woman lived in poverty and many others were close to the poverty line.[21]

The economic impact of an unprotected period of disability caused by pregnancy can be devastating. An extreme example, but one which illustrates the impact of this absence of income protection on so many working women, is that of the plaintiff in *Gilbert* v. *General Electric Co.*, 375 F. Supp. 367 (E.D. Va. 1974), *aff'd*, F. 2d , (4th Cir. 1975), *pets. for cert. filed*, 44 U.S.L.W. 3067 (U.S. 1975) (Nos. 74-1589, 74-1590). This employee worked until five weeks before the birth of her child. She was forced to apply for welfare aid for funds. While she awaited payment, her electric and gas service were cut off, leaving her family without heat, financially destitute while she was disabled from pregnancy. *Gilbert, supra*, 375 F. Supp. at 381, n. 12. It is a denial of equal employment opportunity to deprive women of the sense of security and expectation of continued employment afforded to male employees by the existence of an income protection plan.

[19] Women's Bureau, Employment Standards Admin., U.S. Dept. of Labor, *Who are the Working Mothers?* 3 (Rev. 1972). *See also* Hayghe, *Marital and Family Characteristics of the Labor Force in March 1973*, 97 Monthly Lab. Rev. 21 (April 1974); Jacobson, *Women Workers: Profile of a Growing Force*, 81 American Federationist 9 (July 1974).

[20] Weyand, *Baring the Cost of Bearing, supra*, note 10, at 87.

[21] Women's Bureau Employment Standards Admin., U.S. Dept. of Labor, *Who Are the Working Mothers?* 3 (Rev. 1972).

The social costs of discouraging full participation by women in the work force are serious. There are economic costs to society generated as women who need income to survive and to maintain their families find welfare aid necessary. In addition, society suffers the significant loss of women's contributions to the work force.

Employer practices penalizing women who become pregnant interfere with one of the most fundamental freedoms belonging to a woman, "the decision whether to bear or beget a child." *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972); *Skinner* v. *Oklahoma*, 316 U.S. 535, 541-542 (1942). Policies which require women to leave their jobs due to pregnancy without compensation force them to choose between employment and pregnancy. *Hutchison* v. *Lake Oswego School District*, 374 F. Supp. 1056, 1063 (D. Ore. 1974).

Liberty Mutual's income protection plan, failing as it does to include benefits for pregnancy disabilities, not only penalizes pregnant women, but affects the contributions of all women to the labor force, and, consequently, society as a whole. We submit that the Company's policy is discriminatory and contravenes the public interest.

II. The Company's Exclusion of Pregnancy from its Income Protection Plan is Sex Discrimination Within the Meaning of Title VII.

A. *EEOC Guidelines are Consistent with Congressional Intent to Eliminate All Forms of Sex Discrimination and are Entitled to Judicial Deference.*

Rather than attempting to catalog practices that would violate Title VII, Congress created the Equal Employment Opportunity Commission ("EEOC") and charged it with enforcement of Title VII and with the authority to issue guidelines to carry out its provisions. 42 U.S.C. §2000e-5, 12.

In 1972, the EEOC issued guidelines on the treatment of pregnancy and childbirth in employment policies.[11] Contrary to the Company's assertion, the EEOC did not make a sudden reversal in 1972 of a previously well established policy regarding disabilities related to pregnancy.[13] No guidelines setting forth the EEOC policy were issued by the EEOC on the subject of pregnancy benefits until 1972. On the contrary, EEOC policy evolved gradually on this question. In publish-

[11] The EEOC guidelines provide, in relevant part: "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 C.F.R. § 1604.10(b).

[13] The various opinion letters cited by Liberty Mutual deal with the EEOC's previous position that generally either equal benefits or equal contributions by employers must be available for both sexes where insurance and medical plans are provided. These decisions do not expressly mention pregnancy. At the time, this policy was consistent with that taken under the Equal Pay Act by the Department of Labor and under Executive Order 11246 (3 C.F.R. 339) by the Office of Federal Contract Compliance. *See* 1966 EEOC Ann. Rep. 40-42; EEOC General Counsel Letter G.C. 158-65 (October 12, 1965) and G.C. 588-65 (January 28, 1966) cited in EEOC First Annual Digest of Legal Interpretation (1966) at 22-23.

Another decision cited by Liberty Mutual deals with the EEOC's position that maternity leave must be granted even if an employer does not grant sick leave in order to provide substantial equality of employment opportunity to women. EEOC Dec. No. 70-360 (Dec. 16, 1969) (CCH Emp. Prac. Guide ¶6084).

ing its 1965 guidelines on sex discrimination, the EEOC did not treat the subject of pregnancy, but noted the need for further experience in dealing with sex discrimination and acknowledged its own caution in publishing initial guidelines.[24] In March, 1971, before Congress enacted the 1972 Civil Rights Act,[25] the EEOC issued a decision specifically holding that exclusion of disability due to pregnancy from an employer's insurance program discriminated because of sex within the meaning of § 703(a) of Title VII.[26]

The history of the 1972 Act reveals a concern for the serious problems of sex discrimination. Congress recognized the progressively deeper involvement of the EEOC in combatting sex discrimination as well as the enormity of the tasks remaining. *See* H. R. Reg. No. 92-238, 92d Cong., 1st Sess. 4 (1971). While the available legislative history is scant on the precise issue of treatment of pregnancy, it is entirely consistent with, and supportive of, the guidelines which the EEOC formulated after taking the necessary time to establish policy in a relatively uncharted area.

Liberty Mutual's disability income protection plan does not treat pregnancy-related disabilities as it does all similar temporary disabilities.[27] It totally excludes disabilities caused by both normal and abnormal pregnancies from any income protection.[28] Under the EEOC interpretive guideline this practice would clearly violate Title VII.

[24] 30 Fed. Reg. 14927 (Dec. 2, 1965). *See* Brief for EEOC as *Amicus Curiae* at 10, *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), for an explanation of EEOC's evolving position.

[25] Civil Rights Act of 1964 (Title VII), 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e *et seq.*

[26] EEOC Dec. No. 71-1474 (March 19, 1971) (CCH Emp. Prac. Guide ¶6621).

[27] *See supra* at n. 4.

An interpretation of Title VII by the EEOC, the enforcing agency, is entitled to great deference. *Griggs* v. *Duke Power Company*, 401 U.S. 424, 434 (1971); *Phillips* v. *Martin Marietta Corporation*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring); *Sprogis* v. *United Air Lines, Inc.*, *supra*, at 1198; *Communications Workers of America* v. *American Telephone and Telegraph Company, Long Lines Dept.*, 513 F. 2d 1024, 1030 (2d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3067 (U.S. June 19, 1975) (No. 74-1601). As the agency charged with receiving complaints of discrimination under Title VII, the EEOC is best situated to gather experience over time with the types of practices that have the effect of denying equal employment opportunity to women. It is because of an enforcing agency's experience and expertise in administering a statute that courts give deference to that agency's interpretation of a statute. *Griggs*, *supra*; *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Nearly all the lower federal courts that have considered the EEOC guidelines and the available legislative history have upheld and relied upon the guidelines as a correct interpretation of the intent of Title VII on the question of employer policies concerning pregnancy and childbirth.[29]

[28] In the Company's brief to this Court, it is asserted, contrary to the representation of the Company's counsel before the Court of Appeals, that its plan would cover disabilities suffered by a pregnant woman which do not arise "wholly and solely from pregnancy." Brief for Petitioner at 16, n. 26. While the import of this statement is less than clear, it may be intended to suggest that diseases such as hypertension and diabetes, which are often seriously aggravated by the weight gain associated with pregnancy, would be covered.

[29] *Communications Workers of America* v. *American Tel. & Tel. Co., Long Lines Dept.*, 513 F. 2d 1024 (2d Cir. 1975); *Gilbert* v. *General Electric Co.*, F. 2d (4th Cir. 1975); *Vineyard* v. *Hollister School District*, 64 F.R.D. 580 (N.D. Cal. 1974); *Farkas* v. *South Western City School District*, 506 F. 2d 1400 (6th Cir. 1974); *Satty* v. *Nashville Gas Co.*, F. 2d , Civil No. 75-1083 (6th Cir., Aug. 8, 1975), 10 Emp. Prac. Dec.

Espinoza v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973), cited by the Company, has no applicability to this case. At issue in *Espinoza* was an EEOC interpretive guideline[30] concerning the relationship of citizenship and national origin. *Supra* at 92. In determining that the guideline was inapplicable to the factual situation before it, the Court reasoned that Congress had not intended to bar discrimination against non-citizens in enacting Title VII. It found that the existence of several federal statutes and Civil Service regulations which permitted discrimination against non-citizens gave clear indications that Congress had not reached that type of discrimination in enacting Title VII. In contrast, there are no clear indications in this case of Congressional intent contrary to the EEOC guidelines. Indeed, both the Office of Federal Contract Compliance and the Office of Civil Rights of the Department of Health, Education and Welfare have proposed regulations adopting the position put forth in the EEOC guidelines at issue here.[31]

¶10,359; *Hutchison* v. *Lake Oswego School District*, 374 F. Supp. 1056 (D. Ore. 1974); *contra: Newmon* v. *Delta Air Lines, Inc.*, 374 F. Supp. 238 (N.D. Ga. 1973).

[30] 29 C.F.R. § 1606.1(d) (1972).

[31] O.F.C.C. proposed guidelines, 38 Fed. Reg. 35336 § 60-20.3(h) (2) (December 27, 1973); H.E.W. proposed new rules under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, 39 Fed. Reg. 22237 § 86.47(c) (June 20, 1974). These guidelines deal with a subject considered beyond the reach of the Equal Pay Act. The issue of disability treatment of pregnancy and of maternity payments has been ruled by the administrator of the Wage and Hour Division as involving conditions of employment rather than wages and, therefore, outside the scope of the Equal Pay Act. 29 C.F.R. 800.110 (1967).

In *Satty* v. *Nashville Gas Co.*, the Sixth Circuit was concerned with whether an employer's policy regarding pregnancy violated Title VII. The specific issue involved the relationship of pregnancy leave to loss of seniority and sick leave. The court held that: ". . . absent clear indicia in the form of legislative history that the agency interpretation is unreasonable or unnatural, we must defer to the Commission's construction of the statute as articulated under 29 C.F.R. § 1604.10(b)."

In this case, the EEOC guideline is clearly consistent with Congressional intent to reach the entire spectrum of sex discrimination and with the letter and spirit of Title VII. The Court should therefore defer to the EEOC guideline and find that the Company's policy of excluding pregnancy from its income protection plan violates Title VII.

B. *The Company has Not Raised Any Defenses Permissible under Title VII which Defeat the Respondents' Case of Sex Discrimination.*

1. Respondents have Established a Firm Case of Discrimination under Title VII.

The determinative issue before this Court is whether respondents have made out a case of discrimination under Title VII and whether the Company has justified its policy by successfully raising the defenses permissible under the statute. In the present case, we respectfully submit that respondents have established a firm case of discrimination, and that the Company has not sustained its burden of articulating a legitimate, non-discriminatory defense for the exclusion of pregnancy from its income protection plan.

Discrimination in violation of Title VII occurs both through distinctions based on sex, race, religion, color and national origin and through the application of apparently neutral

policies which have a disparate effect on a particular group. The Company's policy of excluding pregnancy from its income protection plan is discriminatory both because it creates a distinction based on sex and because it has a disparate, adverse impact on women.

In the context of the Company's income protection plan, the exclusion of pregnancy is discriminatory on its face. As a sex-linked phenomenon, pregnancy relates only to women. Although pregnancy is not the only excluded disability, it is the ony sex-unique disability which is so excluded. Thus, the exclusion of that condition from coverage constitutes a facially discriminatory practice because it treats women, a protected class under Title VII, differently from men on the basis of their sex.[32]

The only statutory defense to facially discriminatory conduct is the exception generally known as the Bona Fide Occupational Qualification (BFOQ). Section 703(e) (1), 42 U.S.C. § 2000e-2(e) (1). The employer must demonstrate that sex is a BFOQ reasonably necessary to the normal operation of its business. No such defense to the Company's policy is available here.

The Company's policy is also discriminatory because it has a disparate, adverse effect on women. This Court, in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), established the principle that an apparently neutral policy can have an adverse effect on a particular class. Here, the impact of the pregnancy falls only on women and denies them coverage which their male counterparts enjoy for similar, sex-unique disabilities, such as prostatectomies and vasectomies.

---

[32] *See, e.g., Cheatwood* v. *South Central Bell Telephone & Telegraph Co.*, 303 F. Supp. 754 (M.D. Ala. 1969); *Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

The Company contends that excluding pregnancy as a disability from its income protection plan is not sex-discrimination because the program divides potential recipients into two classes: pregnant and non-pregnant persons, with both men and women in the latter class. The structural basis for this conclusion is infirm and should be rejected by the Court in this case.

The fact that only *some* women will be affected does not validate the Company's policy. In rendering its decision in *Sprogis* v. *United Air Lines*, the Fourth Circuit interpreted § 703(a) and considered the legislative history in determining what constituted sex-discrimination. 444 F. 2d at 1197-1198. In *Sprogis*, the issue before the court was whether the airline's no-marriage rule for stewardesses discriminated on the basis of sex since it was not applied to male stewards or other female employees. The court deemed irrelevant the fact that not all women employees were subject to the company's rule, on the grounds that sex was *a* factor in the application of the rule.

> "Section 703(a) (1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past. The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex . . . or through the unequal application of a seemingly neutral policy." 444 F. 2d at 1198.[33]

---

[33] *Cf. Cheatwood* v. *South Central Bell Telephone & Telegraph Co.*, 303 F. Supp. 754 (M.D. Ala. 1969), where the court held that not all women could be excluded as commercial representatives despite expert testimony that 25 per cent-50 per cent of all women could probably not physically perform the job.

In proving up a discrimination case under Title VII one need not prove that race or sex is the sole factor operating in a defendant's conduct, only that it is *a* factor. *Smith* v. *Sol D. Adler Realty Co.*, 436 F. 2d 344 (7th Cir. 1971).

In examining the pregnancy policies of employees within the meaning of Title VII, numerous courts have found violations of the Act. In a case factually identical to the one before this Court, the Fourth Circuit Court of Appeals held the denial of pregnancy-related disability benefits to be a violation of Title VII: "A disability program which, while granting disability benefits generally, denies such benefits expressly for disability arising out of pregnancy, a disability possible only among women, is manifestly one which can result in a less comprehensive program of employee compensation and benefits for women employees than for men employees; and would do so on the basis of sex." *Gilbert* v. *General Electric Co.*, *supra*, at 5121. In rejecting the argument that pregnancy was functionally distinguishable from other kinds of disabilities the court emphasized that other "voluntary" disabilities such as cosmetic surgery and attempted suicides were covered, *supra*, at 5121. Most significantly, the *Gilbert* court distinguished *Geduldig* on the ground that *Geduldig* turned on the legitimacy of a legislative classification under the Fourteenth Amendment and not on a statutory interpretation of Title VII. Utilizing similar analysis, the Second Circuit reached the same conclusion about *Geduldig* in finding a violation of Title VII for an employer's exclusion of pregnancy from its income protection plan. *Communications Workers of America* v. *American Tel. & Tel. Co., Long Lines Dept.*, 513 F. 2d 1024 (2d Cir. 1975).[34] This case involves essentially the same issues

[34] Courts have uniformly held that employers who fail to compensate women employees (sick pay) for absences relating to pregnancy are discriminating on the basis of sex in violation of Title VII: *Dessenberg* v. *American Metal Forming Co.*, 8 CCH Emp. Prac. Dec. ¶9575 (N.D. Ohio 1973); *Farkas* v. *South Western City School District*, 508 F. 2d 1400 (6th Cir. 1974); *Lillo* v. *Plymouth Board of Education*, 8 CCH Emp. Prac. Dec. ¶9510 (N.D. Ohio 1973); *Satty* v. *Nashville Gas Co.*, F. 2d , Civil No. 75-1083 (6th Cir., Aug. 8, 1975); *Hutchison* v. *Lake Oswego School District*, 10 CCH Emp. Prac. Dec. ¶10,325 (9th Cir. 1975), *aff'g in part, rev'g in part* 374 F. Supp. 1056 (D. Ore. 1974).

and the decision of the Third Circuit court should therefore be affirmed (*supra*, at n. 5).

2. The Company has Not Justified its Discriminatory Policy by Raising the Defenses Permissible under Title VII.

In the present case the respondents have established their case of discrimination: the Company's policy makes distinctions based on sex and has a disparate impact on a protected class. Once the plaintiff establishes a case of discrimination the burden shifts to the defendant to assert "some legitimate, nondiscriminatory reason" for the allegedly discriminatory conduct. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). The Company has raised several defenses which, upon inspection, all fail for want of legal validity under Title VII.

When a challenged policy has a disparate impact on a protected class courts have permitted employers to raise the business necessity defense. *See Griggs* v. *Duke Power*, *supra*. In order for the defense to be sustained the employer must meet the requirements as set out in *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 798 (4th Cir. 1971): "the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced." The only defense advanced by petitioner which could come within the ambit of the business necessity doctrine is the contention that the inclusion of pregnancy in an income protection plan would be prohibitively expensive. Without more, it is highly doubtful that cost alone could constitute a proper defense to such a charge: "While considerations of economy and efficiency will often be relevant to determining the existence of business necessity,

dollar cost alone is not determinative." *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 799, n. 8 (4th Cir. 1971). *Hutchison* v. *Lake Oswego School District*, 10 CCH Emp. Prac. Dec. ¶10,325, 5326 (9th Cir. 1975); *Gilbert* v. *General Electric Co.*, 375 F. Supp. 367, 382 (E.D. Va. 1974).

Even assuming, *arguendo*, that cost would constitute a valid business necessity, the Company has failed to show that its cost estimates are not speculative and hypothetical or that no acceptable alternatives exist to reduce cost.

The Company's cost estimates are based on unreliable predictions about the number of women in that company's work force who will bear a child while employed, the amount of time each will be disabled,[35] and the frequency that the pregnancy will be complicated by other medical conditions. There is no precise way for Liberty Mutual to calculate the birth rate for its female employees. In addition, some estimates erroneously include the cost of benefits extending far beyond the period of actual physical disability. It is imperative to keep in mind that disability would extend only to the actual period of physical incapacity and not time devoted to child-rearing.[36] Maximum benefits should be allowed only while the woman is actually disabled. The determination as to when childbearing ends and child-rearing begins should be carefully made on an individual basis by a physician.

[35] Estimates vary as to the period of disability for a normal pregnancy: some physicians are of the opinion that the period of disability ranges between 10 days and 3 weeks after delivery; others estimate that most women are unable to work for a period of between six and eight weeks following a normal pregnancy. *Love's Labors Lost; New Concepts of Maternity Leaves*, 7 Harv. Civ. Rights Civ. Lib. L. Rev. 280 (1972); Zimmerman, Comment, *Geduldig* v. *Aiello; Pregnancy Classifications and the Definition of Sex Discrimination*, 75 Colum. L. Rev. 441 (1972).

[36] *See Comment, Geduldig* v. *Aiello*, 75 Colum. L. Rev. 441 (1975); *Hayden, Punishing Pregnancy; Discrimination in Education, Employment and Credit;* ACLU Women's Rights Project, October, 1973.

Another factual consideration missing from the Company's cost argument is data concerning the overall absenteeism rate for men and women. A recent Public Health Service study dispels the myth that women employees are absent from work more than their male counterparts and demonstrates that there is little actual difference in the absentee rate due to illness or injury between men and women: 5.6 days a year for women as compared with 5.2 for men.[37]

Even if the Company had presented evidence indicating that the inclusion of pregnancy coverage would provide greater economic benefit to women it would not constitute a valid defense under Title VII. In order to equalize employment opportunities and working conditions for women employers the Company must adjust its policy to accommodate what one court has termed "women's biologically more burdensome place in the scheme of human existence." *Gilbert* v. *General Electric Co.*, *supra* at 383; *see also Sale* v. *Waverly Shell Rock Board of Education*, 390 F. Supp. 784, 788 (N.D. Iowa, 1975). The Company has presented no evidence to meet the requirements of the business necessity defense as set forth in *Robinson*, *supra*, and thus has not rebutted the respondent's case of discrimination.

The Company has raised another defense for its policy by asserting that pregnancy is functionally distinguishable from other disabilities. Pregnancy shares with other disabilities the same salient features — a physical inability to work and the expense of medical attention. Characterization of pregnancy as a voluntary condition which makes it qualitatively different from other disabilities is an inaccurate and irrelevant articulation of the issue. The fact that some pregnancies are planned and entered into willingly is, quite simply, beside the point. As one court so aptly put it: "'The perpetuation of the human

[37] Women's Bureau Employment Standards Admin., U.S. Dept. of Labor, *The Myth and the Reality* (Rev. May, 1974).

race cannot be termed a voluntary act, but it rests upon instincts and desires, which are fundamentally imperative.'" *Black* v. *School Committee of Malden*, Mass. Adv. Sh. (1974) 637, 310 N.E. 2d 330, 339 n. 18. This Court has recognized that, like race and national origin, sex "is an immutable characteristic determined solely by the accident of birth." *Frontiero* v. *Richardson*, 411 U.S 677, 686 (1973). That only women may become pregnant is undeniable. To distinguish pregnancy from other disabilities on the ground that it is voluntary is meaningless because no options are available for those men and women who wish to have a natural child.

The "voluntariness" argument is further undermined by the fact that other "voluntary" disabilities are included in the Company's income protection plan — cosmetic surgeries, vasectomies, prostatectomies. Pregnancy-related disabilities are the only sex-unique disabilities which are not covered by the Company's income protection plan.

A significant number of pregnancies are involuntary since no foolproof method of contraception has been developed. Although birth control methods have substantially improved over the last few years, the failure rate of various devices is significant.[38] In addition, many of the most effective methods of contraceptions present serious medical hazards to some women.

Many disabling situations occur as a result of involuntary pregnancies or as complications of a voluntary pregnancy. The rape-induced pregnancy is one example of an involuntary conception. Due to the high number of unreported rapes, it is

[38] The following are the number of pregnancies occurring per 100 women per year resulting from the failure of contraceptive devices: (1) Oral contraceptives: 2 to 5 pregnancies; (2) Diaphragm: 20 to 25 pregnancies; (3) Intra-uterine devices: 6 pregnancies; (4) Coitus interruptus: 20 to 25 pregnancies; (5) Rhythm (calendar): 35 pregnancies; (6) Condom: 15 to 20 pregnancies. *Contraceptive Technology 1974-1975* at 11, Emory Family Planning Program, Emory University Medical School, Atlanta, Georgia.

difficult to obtain statistics on the number of women who become pregnant as the result of a rape. Abnormal pregnancies, which were not considered by this Court in *Geduldig*, are never bargained for and must be terminated in order to save the mother's life. Ectopic pregnancies, ones in which the fertilized egg attaches in the fallopian tube rather than the uterus, are potentially fatal, and occur with varying frequency depending on the woman's overall health.[39] About 10 per cent of pregnant women miscarry. Detachment and mislocation of the placenta are also common complications of pregnancy that require immediate surgery. Abortions presumably would also be excluded — even to prevent the birth of children with birth defects or genetically fatal diseases such as Tay-Sachs disease. All of these conditions to which only women are susceptible are not covered by the Company's plan.

The respondents have established a case of sex discrimination which has not successfully been rebutted by the Company. The defenses it has raised are not determinative in scrutinizing an employer's pregnancy policies within the mandate of Title VII.

III. The Decision in Geduldic v. Aiello did Not Reach Sex Discrimination Proscribed by Title VII and Therefore it is Not Dispositive of this Case.

The Company contends that *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), is controlling in the instant case. We submit that the Court of Appeals for the Third Circuit was correct in holding that *Geduldig* is not dispositive of the issues presently before this Court and that the factual distinctions in this case mandate an affirmance of the lower court's decision. *Wetzel* v. *Liberty Mutual Insurance Co.*, 511 F. 2d 199 (3d Cir. 1975).

[39] *See, e.g.*, Novak, *Textbook of Gynecology*, 8th ed. 1970, at 497.

The critical factor which differentiates the two cases is that *Geduldig* involved a challenge to a state statute under the Equal Protection Clause of the Fourteenth Amendment and this case concerns an employer practice subject to the reach of Title VII, a statute specifically enacted to insure full equality in employment. In *Geduldig* the Court's concern focused on a statutory insurance system administered by the State of California which issued and paid benefits to persons in private employment not otherwise covered by privately offered plans. The plan was funded entirely form contributions deducted from the wages of participating employees. The State elected not to cover conditions resulting from a person's court commitment as a dipsomaniac, drug addict, or sexual psychopath and disabilities relating to normal pregnancies.[40]

The fact that this Court sustained the validity of California's statute against an Equal Protection challenge fundamentally reflects this Court's traditional concern with granting states discretion in addressing their own problems. State legislative enactments carry with them a *prima facie* presumption of validity against Fourteenth Amendment challenges. *McGowan* v. *Maryland*, 366 U.S. 420, 425-426 (1961). In determining the constitutional validity of a state legislative enactment under the Fourteenth Amendment courts first assess whether the statute rationally serves a legitimate government objective. *See, e.g., Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972). The standards of judicial review are confined to the rationality of the state's judgments, and do not probe either the wisdom or perfection of the legislation involved. *See Dandridge* v. *Williams*,

[40] As a result of a suit brought by a woman who had suffered an ectopic pregnancy the California state court construed § 2626 as providing benefits for disabilities resulting from abnormal and involuntary complications of pregnancy. *Rentzer* v. *Unemployment Insurance Appeals Board*, 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (1973).

supra, at 485; *Williamson* v. *Lee Optical Co.*, 348 U.S 483, 489 (1955).

In the area of social welfare and economics, courts are especially deferential to state legislation. *See Dandridge* v. *Williams*, *supra*, at 485; *Jefferson* v. *Hackney*, *supra*, at 546. The judiciary appreciates the fact that the balancing of competing interests and fiscal needs is a delicate and difficult task, one which is most appropriately done by the state legislatures. This Court recognized this fact in *Jefferson* v. *Hackney*, *supra*, at 546-547. "The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them."

The outer limits of a court's inquiry are whether the state statute is invidious; if so, it crosses the threshold of presumptive validity and is declared unconstitutional. *See Jefferson* v. *Hackney*, *supra*, at 546; *Geduldig* v. *Aiello*, *supra*, at n. 20, p. 496. Thus, the Court in *Geduldig* found that the legislative policies to be furthered by the California program and the probable effects on the self-sustaining nature of the program of inclusion of pregnancy-related disabilities provided a nondiscriminatory basis for California's decision not to "create a more comprehensive social insurance program than it already has." *Geduldig*, *supra*, at 496.

The Company has greatly overextended the reach of *Geduldig* and misplaced its reliance on the Court's language in footnote 20.[41] Contrary to the Company's contentions, the footnote deals only with the standards to be applied in weighing the constitutional validity of legislative classifications under the Fourteenth Amendment. *See Communications Workers* v. *American Tel. & Tel. Co., Long Lines Dept., supra.* It in no way addresses sex-discrimination under Title VII; nor does it

[41] "Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." *Geduldig*, *supra*, at n. 20, pp. 496-497.

posit a test of validity for that Act. In the present case there is no challenge to state legislation on constitutional grounds. Here, the Company's practice is challenged as a violation of a statute which Congress enacted to deal specifically with discrimination in the area of employment.

Under the Commerce Clause of the Constitution, Article 1, § 8, cl. 3, Congress, in the exercise of its plenary power over interstate commerce, may regulate commerce or anything which affects it in an economic or non-economic way. *See* S. Rep. No. 872, 88th Cong., 2d Sess. 12 (1964). In enacting Title VII, Congress exercised this power to prohibit discriminatory practices in private employment which would inhibit interstate commerce. *Id.*

The Ninth Circuit, in a case challenging the denial of sick leave for a pregnancy-related disability as violative of the Equal Protection Clause and Title VII, recently distinguished the two provisions. *Hutchison* v. *Lake Oswego, supra.* With respect to the constitutional claim, the court found that *Geduldig* applied because the plaintiff had not demonstrated that the school board's policy was a "mere pretext designed to effect an invidious discrimination," *supra,* at 5324. However, the court had no difficulty in finding a Title VII violation; it reasoned that footnote 20 in *Geduldig* was inapplicable because Title VII was not at issue in that case, and emphasized that the sweep of the Act was comprehensive and unequivocal, unlike the Equal Protection Clause. In conclusion, the court held that: "clearly, a sick leave policy which excludes from coverage absences related to pregnancy or child-birth adversely and disparately affects women with respect to employment benefits." *Supra,* at 5325. Other courts considering the disparity of treatment between pregnancy-related and other disabilities in the context of Title VII have so concluded. *See* text, n. 34, *supra.*

Thus, the standards of review chosen by Congress to evaluate the validity of employee practices under Title VII are different from those used to judge the validity of a legislative action under the Equal Protection Clause. Courts must simply assess the defenses permitted to defeat a charge of discrimination under Title VII — BFOQ and the business necessity doctrine — to determine if they justify a discriminatory practice. There is no need to ascertain whether the Company has a rational basis for its discriminatory actions.

The sweep and standards of Title VII compel the conclusion that *Geduldig* is not dispositive of the issue before this court.

Conclusion.

For the reasons set forth above, the decision of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

Commonwealth of Massachusetts:
FRANCIS X. BELLOTTI,
Attorney General,

State of Florida:
ROBERT L. SHEVIN,
Attorney General,

State of Maine:
JOSEPH E. BRENNAN,
Attorney General,

State of Michigan:
FRANK J. KELLEY,
Attorney General,

State of Missouri:
JOHN C. DANFORTH,
Attorney General,

Commonwealth of Pennsylvania:
ROBERT P. KANE,
Attorney General,

State of Vermont:
M. JEROME DIAMOND,
Attorney General,

State of Wisconsin:
BRONSON C. LaFOLLETTE,
Attorney General,

Attorneys for the *Amici*.

Department of the
Attorney General,
Room 373, State House,
Boston, Massachusetts 02133.
(617) 727-2238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY, A Corporation,
Petitioner,

v.

SANDRA WETZEL, and MARI ROSS, on Behalf of Themselves and All Others Similarly Situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

MILTON A. SMITH
General Counsel
RICHARD B. BERMAN
Labor Relations Counsel,
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
1615 H Street, N.W.
Washington, D. C. 20006

GERARD C. SMETANA
JERRY KRONENBERG
JULIAN D. SCHREIBER
BOROVSKY, SMETANA, EHRLICH & KRONENBERG
2011 Eye Street, N.W.
Suite 800
Washington, D. C. 20006

Attorneys for the Amicus Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

12371-8-75

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY, A Corporation,
Petitioner,

v.

SANDRA WETZEL, and MARI ROSS, on Behalf of
Themselves and All Others Similarly Situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States of America respectfully moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached

brief *amicus curiae* on behalf of the petitioner in this case.

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000) and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court; *e.g.; Geduldig* v. *Aiello, et al.,* 417 U.S. 484 (1974); *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971); *Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100, etc.,* No. 73-1256; *Boy's Markets* v. *Retail Clerks Union,* 398 U.S. 235 (1970); *H.K. Porter Co.* v. *N.L.R.B.,* 397 U.S. 99 (1970); *Sears, Roebuck and Co.* v. *Carpet Layers, Local 419,* 397 U.S. 655 (1970); *Super Tire Engineering Co., et al.* v. *McCorkle, et al.,* —— US ——, 85 LRRM 2913 (April, 1974). The Chamber has participated as an *amicus* in the court below.

There are issues in this case that are of major importance to the Chamber's members: whether an em-

ployer may exclude pregnancy and related conditions from his disability program without being guilty of illegal sex discrimination under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e to 2000e-15) and what deference is due to the Equal Employment Opportunity Commission's new pregnancy guidelines. These issues are matters of national concern because most employers have benefit policies, and most employers come within the provisions of Title VII of the Civil Rights Act. Further, the collective bargaining agreements of a substantial number of these employers contain provisions concerning the payment of fringe benefits. The Chamber is, thus, vitally concerned that these questions be properly resolved. Because of its broad representation of employers, the Chamber is in a position to present arguments to this Court which might not otherwise be advanced by the parties.

Indeed, as stated, the Chamber participated as an *amicus curiae* in *Geduldig* v. *Aiello, supra,* before this Court, and it appears from reading this Court's *Aiello* opinion that the Chamber's arguments were carefully and favorably considered. Moreover, the Chamber has advanced the arguments urged herein to this Court in its Brief in Support of the Petition for Certiorari in this cause, as well as to the court below and to the Court of Appeals for the Fourth Circuit in *Gilbert* v. *General Electric Company,* —— F.2d ——, June 27, 1975, 126 Daily Lab. Rpt. D-1 petitions for cert. pend. Nos. 74-1589 and 74-1590.

Wherefore, for the foregoing reasons, the Chamber of Commerce of the United States of America respectfully requests that this Motion for Leave to File an

Amicus Brief be granted. Filed herewith is our brief as *amicus curiae.*

Respectfully submitted,

BY:_____

GERARD C. SMETANA
JERRY KRONENBERG
JULIAN D. SCHREIBER
BOROVSKY, SMETANA, EHRLICH & KRONENBERG
2011 Eye Street, N.W.
Suite 800
Washington, D. C. 20006

Attorneys for the Amicus Curiae

MILTON A. SMITH
General Counsel
RICHARD B. BERMAN
Labor Relations Counsel,
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
1615 H Street, N.W.
Washington, D. C. 20006

INDEX

Page

SUMMARY OF ARGUMENT 1

ARGUMENT 4

A. The Exclusion of Pregnancy Benefits Does Not Affect Women in an Area Where They Are Similarly Situated With Men 4

B. Pregnancy, Just as Any Other Physical Disability, May Be Excluded from Insurance Coverage on Any Reasonable Basis 7

C. The EEOC's Sex Discrimination Guidelines Are Invalid and Are Entitled To No Weight 13

1. *Aiello* Repudiated These Guidelines 13

2. Independent Considerations Demonstrate These Guidelines Are Invalid 15

a. The Commission's sex discrimination guidelines do not constitute a contemporaneous construction of Title VII 15

b. The pregnancy guidelines were not issued with the evident thoughtfulness that marks agency expertise 18

CONCLUSION 23

INDEX OF AUTHORITIES CITED

CASES:

Alabama v. United States, 304 F.2d 583 (CA 5), aff'd mem., 371 U.S. 37 (1962) 9

Albemarle Paper Co. v. Moody, 43 U.S.L.W. 4880 (June 25, 1975) 18

Cleveland Board of Education v. LaFleur, 414 U.S. 632, 6 F.E.P. Cases 1253 9

Cohen v. Chesterfield County School Board, — U.S. — (1974) 19

	Page
Columbia Broadcasting Sys., Inc. v. U. S., 316 U.S. 407 (1942)	19
Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (CA 3), cert. denied, 402 U.S. 944 (1971)	9
Dewey v. Reynolds Metal Co., 402 U.S. 689 (1971)	7
Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973)	3, 15, 20
Gatson County v. United States, 395 U.S. 285 (1969)	9
Geduldig v. Aiello, et al., 417 U.S. 484 (1974)	2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 15
Glidden Company v. Zdanok, 370 U.S. 530 (1962)	21
Griggs v. Duke Power Company, 401 U.S. 424 (1971)	3, 9, 10, 11, 12, 13, 20, 21
Jefferson v. Hackney, 406 U.S. 535 (1972)	11, 12
Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (CA 10, 1970), cert. denied, 401 U.S. 954 (1971)	9
Local 189 United Paper Makers and Paper Workers v. United States, 416 F.2d 980 (CA 5, 1969)	12
Louisiana v. United States, 380 U.S. 145 (1965)	9
N.L.R.B. v. Boeing Co., 412 U.S. 61 (1973)	18
Newman v. Delta Air Lines, 374 F. Supp. 238, 7 F.E.P. Cases 26 (N.D.Ga. 1973)	12, 19, 21
Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (CA 2, 1968)	9
Papermakers Local 189 v. United States, 416 F.2d 980 (CA 5, 1969), cert. denied, 397 U.S. 919 (1970)	9
Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971)	6, 7
Robinson v. Lorillard Corporation, 444 F.2d 791 (CA 4, 1971)	18
Skidmore, et al. v. Swift and Co., 323 U.S. 134 (1944)	15
Williams v. New Orleans Steamship Assn., 341 F.Supp. 613 (E.D. La., 1972)	18

	Page
STATUTES:	
Administrative Procedure Act, Section 4, 5 U.S.C., Section 553	19
Civil Rights Act of 1964	
Sections 701, *et seq.*, 42 U.S.C., Sections 2000e, *et seq.*	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 15, 16, 17, 18, 19, 21
Section 701(j) 42 U.S.C., Section 2000e(j)	7
Section 703(a), 42 U.S.C., Section 2000e-2(a)	6
Section 713(a), 42 U.S.C., Section 2000e-12(a)	22
National Labor Relations Act, 29 U.S.C., Sections 151, *et seq.*	22
Railroad Unemployment Insurance Act of 1946, 45 U.S.C., Section 351(k)(z)	21
MISCELLANEOUS:	
110 Cong. Rec. 2575	22
117 Cong. Rec. H9368 (daily ed. October 12, 1971)	21
H.R. Rep. No. 92-359, 92nd Cong., 1st Sess. 7 (1971)	21
S. Rep. No. 92-689, 92nd Cong., 1st Sess. 12 (1972)	21
Davis, Administrative Law Text, Section 5.03 (1959)	15
CCH Employment Practices 12-21-66 Paragraph 17, 304.43	16
CCH New Developments Paragraph 8804, EEOC Attorney Discusses Sex Discrimination and Fringe Benefits Under Title VII, 1964 Civil Rights Act.	17
Legislative History of Equal Employment Opportunity Act of 1972 (GPO, November, 1972)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY, A Corporation,
Petitioner,

v.

SANDRA WETZEL, and MARI ROSS, on Behalf of Themselves and All Others Similarly Situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

SUMMARY OF ARGUMENT *

The crucial issue here is whether an employer may exclude pregnancy and related conditions from his disability program without being guilty of illegal sex discrimination under Title VII. This issue has been propelled into national prominence not only by the expanded coverage of Title VII and the fact that most

---

* The interest of the *amicus* is set forth in the accompanying Motion.

employers have illness or benefit plans, but also due to this Court's recent decision in *Geduldig* v. *Aiello, supra.*

This Court in *Aiello* recognized explicitly there can be no prohibited sex discrimination unless men and women, otherwise similarly situated, are unequally treated solely because of sex. That is, unequal treatment between different categories of the same sex is not proscribed discrimination because of sex. It necessarily follows, as the *Aiello* Court held, that excluding pregnancy from a benefit plan is not interdicted sex discrimination inasmuch as this exclusion does not affect women in an area where they are similarly circumstanced with men.

The *Aiello* analysis is apposite to and dispositive of the issues here presented. Since both the Fourteenth Amendment and Title VII represent interdictions against discrimination, the test to determine whether these equivalent proscriptions have been violated should be identical absent an explicit expression from this Court manifesting a contrary intent. Such an enunication is absent here. Indeed, whether the validity of a pregnancy exclusion is contested under Title VII or the Fourteenth Amendment, the facts are identical: an insurer's [1] rules concerning benefits related to pregnancy do not affect women in an area where they are similarly situated with men; the exclusion of pregnancy is merely the removal of one physical condition from the list of compensable disabilities; whatever unequal treatment existed because of this exclusion occurred between different categories of the same sex;

[1] As used herein the word "insurer" means employers who either pay maternity benefits as self-insurers or as purchasers of such coverage from the independent insurance companies.

under a plan excluding pregnancy there is no risk from which men are protected and women are not. Accordingly, the exclusion of pregnancy disability from a list of compensable disabilities should no more support a finding of proscribed sex discrimination under Title VII than under Amendment Fourteen.

Furthermore, this Court observed in *Aiello* that where the inclusion of pregnancy benefits will result in increased premiums or decreased benefit payments for other covered disabilities, the exclusion of these benefits is legitimate and reasonable. Inasmuch as the objective of both state and private insurers is to construct a comprehensive benefit program at a minimal cost, it follows that the test of legitimacy also should be equivalent whether the Fourteenth Amendment or Title VII is involved. To read *Aiello* as not applying to private insurers would produce the anomaly where a state, possessing manifold resources from which to obtain funds, nevertheless would be permitted to exclude pregnancy from its benefit program as too costly, while a private insurer lacking such resorts could be required to endure the exorbitant cost of coverage or to terminate utterly his benefit program.

In addition to the foregoing, this case presents an issue that permeates many Title VII cases: under what circumstances should courts defer to the Equal Employment Opportunity Commission's guidelines. There is need for this Court to again address the issue since many courts have failed to adhere to the teachings of *Griggs* and *Espinoza* [2] that the Commission's guidelines are entitled to weight only if the conclusion is in-

[2] *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971); *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973).

escapable that they comport with the Congressional intent. When this standard is applied, the guideline involved in the instant cause (Section 1604.10, adopted 1972), is entitled to no weight, and therefore the court below erred in deferring to the Commission's view of Title VII.

ARGUMENT

THE EXCLUSION OF PREGNANCY BENEFITS FROM AN INSURANCE PROGRAM DOES NOT INHERENTLY CONSTITUTE PROSCRIBED SEX DISCRIMINATION

The Chamber contends that an employer should not be required by Title VII to provide benefits for pregnancy on the same terms as he provides benefits for illness or injury. Furthermore, the Chamber urges that the EEOC's guideline containing this requirement is invalid and entitled to no weight by this Court.

The *amicus* draws cogent support for his position from this Court's decision in *Geduldig* v. *Aiello, supra.* There this Court held that a state disability insurance program may exclude from coverage disability caused by normal pregnancy and childbirth without violating the Equal Protection Clause of the Fourteenth Amendment. The Chamber asserts that the *Aiello* Court's analysis is apposite to and dispositive of similar issues arising under Title VII.

A. The Exclusion of Pregnancy Benefits Does Not Affect Women in an Area Where They Are Similarly Situated With Men.

As this Court in *Aiello* recognized explicitly, there can be no prohibited sex discrimination unless men and women, otherwise similarly situated, are unequally treated solely because of sex. That is, unequal treatment between different categories of the same sex is not proscribed discrimination because of sex. It necessarily follows, as the *Aiello* Court held, that excluding pregnancy from a benefit plan is not interdicted sex discrimination inasmuch as this exclusion does not affect women in an area where they are similarly circumstanced with men. In reaching this conclusion, this Court expressly rejected the position urged by the dissenters in *Aiello.* Thus, fundamental to the dissenters' position was the premise that the exclusion of a sex-related disability, such as pregnancy, *per se* amounted to proscribed sex discrimination.[3] In repudiating this view, the *Aiello* Court held instead that California's benefit plan did not constitute prohibited sex discrimination, though pregnancy was excluded, since under the plan ". . . there is no risk from which men are protected and women are not." (417 U.S. at 496-497).

There is nothing in *Aiello* that suggests that this Court's analysis of what may in fact constitute prohibited sex discrimination is inapplicable when Title VII, rather than the Fourteenth Amendment, is involved. Moreover, it is apparent that the conclusions concerning the legitimacy of California's insurance program reasonably apply with equal vitality in Title VII cases, when private benefit programs which exclude only pregnancy from compensable disabilities are examined to determine whether or not prohibited sex discrimination exists. Thus, since both the Fourteenth Amendment and Title VII represent interdictions

---

[3] The dissenters stated " . . . dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination." (417 U.S. at 501).

against discrimination, the test to determine whether these equivalent proscriptions have been violated should be identical absent an explicit expression from this Court manifesting a contrary intent. Moreover, whether the validity of a pregnancy exclusion is contested under Title VII or the Fourteenth Amendment, the facts of the situation are identical: an insurer's rules concerning benefits relating to pregnancy do not affect women in an area where they are similarly circumstanced with men. That is, deprivation of pregnancy benefits does not in fact constitute dissimilar treatment for men and women since there is no risk from which men are protected and women are not, whether Title VII or the Fourteenth Amendment is involved. Accordingly, the exclusion of pregnancy disability from a list of compensable disabilities should no more support a finding of proscribed discrimination under Title VII than under Amendment Fourteen.

The Chamber's contentions here are endorsed by a comparison of this Court's decisions in *Aiello* and in *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971). These decisions demonstrate that the variables employed to determine whether proscribed sex discrimination exists are identical whether Amendment Fourteen or Title VII is involved. As stated, *Aiello* recognized that there can be no prohibited sex discrimination unless men and women, otherwise similarly situated, are unequally treated solely because of sex. Similarly, *Martin* held that under Title VII there can be no proscribed sex discrimination unless men and women, who are otherwise equally qualified for the same job are treated unequally solely because of sex: "Section 703(a) of the Civil Rights Act of 1964 requires that

persons of like qualifications be given employment opportunities irrespective of their sex." 400 U.S. at 544.[4]

Consequently, the attempt by the court below to distinguish *Aiello because* that case did not involve private insurance plans and Title VII must fail. For that Court to simply state this difference does not demonstrate any reason to hold *Aiello's* analysis of insurance plans inapplicable to Title VII cases, and the decision below has offered no such demonstration.

B. Pregnancy, Just as Any Other Physical Disability, May Be Excluded from Insurance Coverage on Any Reasonable Basis.

In addition to holding the California plan valid for reasons set forth in part A of this brief, this Court in *Aiello* has recognized that the insurer has a reasonable and legitimate interest in utilizing available benefit funds effectively and in maintaining contribution rates at a level that will not burden those who require insur-

---

[4] In 1972 Congress amended the definition of "religion" set forth in Section 701(j) to broadly include "all aspects of religious observance and practice, as well as belief . . ." in order to require employers to fully adjust their work schedules to accommodate religious practices. As the sponsor of this amendment stated, his purpose was to resolve any uncertainty as to the scope of religious protection resulting from this court's ruling in *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689 (1971). Legis. Hist. of Equal Employment Opportunity Act of 1972 (GPO November 1972) p. 713 (remarks of Senator Randolph). Congress' failure to also broaden the scope of sex discrimination protection must be taken as demonstrating Congress' approval of this Court's *Martin* rationale, and this legislative history is further support for the position advanced by the Chamber herein.

ance coverage.[5] Thus this Court observed that where the inclusion of pregnancy benefits will result in increased premiums or decreased benefit payments for other covered disabilities, the exclusion of pregnancy is legitimate and reasonable. *Aiello* at 493-494.

The Chamber believes that this aspect of *Aiello,* like that discussed in part A, *supra,* is equally apposite to the similar issues arising under Title VII in this case. In *Aiello,* the Court upheld the exclusion of pregnancy since this exclusion was rationally related to the State's legitimate cost saving interests in maintaining an efficient insurance program. There is no logical reason to subject private insurers to a more stringent test when the legality of an exclusion of pregnancy related disabilities is at issue.[6] Rather, as stated, since both the Fourteenth Amendment and Title VII represent interdictions against discrimination, the test to de-

---

[5] This Court has stated in its *Aiello* decision:

> "The State has a legitimate interest in maintaining the self-supporting nature of its insurance program. Similarly, it has an interest in distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately. Finally, California has a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of the disability insurance." 417 U.S. at 496.

[6] In California, it appears that approximately 10% of the disability insurance there written is administered by private employers. These employers are required by California law to provide benefits identical to or greater than those provided by the state. Unless *Aiello* applies to private insurers, the state will be permitted to exclude pregnancy from its plan while a private insurer who models his plan after the state's may be denied this right. Such a result would be grossly inequitable.

termine whether these proscriptions have been violated should be identical absent an explicit expression from this Court manifesting a contrary intent.

Furthermore, inasmuch as the objective of both state and private insurers is to construct a comprehensive benefit program at a minimal cost, it follows that the test of legitimacy also should be equivalent whether the Fourteenth Amendment or Title VII is involved.[7] To read *Aiello* as not applying to private insurers would produce the anomaly where a state, possessing manifold resources from which to obtain funds, never-

---

[7] There can be no doubt that the development of the equal employment opportunity law under Title VII of the Civil Rights Act of 1964 has been significantly affected by concepts first enunciated in equal protection cases involving education, voting or other civil rights. See *e.g., Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971) (citing *Gatson County* v. *United States,* 395 U.S. 285 (1969), re. educational disadvantage and voting standards); *Contractors Ass'n of Eastern Pa.* v. *Secretary of Labor,* 442 F.2d 159 (CA 3), *cert. denied,* 402 U.S. 944 (1971), and *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F.2d 920 (CA 2, 1968) re. the appropriateness of color conscious remedial action in public school employment and in public housing matters); *Jones* v. *Lee Way Motor Freight, Inc.,* 431 F.2d 245 (CA 10, 1970), *cert. denied,* 401 U.S. 954 (1971) (citing *Alabama* v. *United States,* 304 F.2d 583 (CA 5), *aff'd. mem.,* 371 U.S. 37 (1962), re. the significance of statistical evidence showing that blacks had not served on juries in areas in which blacks constituted a substantial part of the population); *Papermakers Local 189* v. *United States,* 416 F.2d 980 (CA 5, 1969), *cert. denied,* 397 U.S. 919 (1970) (citing *Louisiana* v. *United States,* 380 U.S. 145 (1965), and other cases re. facially neutral standards in voting registration as perpetuating past discrimination). Thus, the constitutional and statutory precedents have been basically merged. Now that Title VII has been made applicable to the employment practices of state and local governments by the Equal Employment Opportunity Act of 1972, the need for consistency in the principles applicable to public and private employers is even more apparent. See *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, 6 F.E.P. Cases 1253, 1256 n. 8.

theless would be permitted to exclude pregnancy from its benefit program as too costly, while a private insurer lacking such resorts could be required to endure the exorbitant cost of coverage or to terminate utterly his benefit program.[8]

The *Aiello* rationale is in harmony with previous decisions of this Court. That is, on analysis, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), while frequently cited by plaintiffs in Title VII proceedings, is in accord with the *Aiello* decision and with the positions herein asserted. There, in *Griggs,* the employer required as a condition of employment that applicants have a high school education or that they pass a standardized general intelligence test. These requirements operated to disqualify Blacks at a substantially higher rate than white applicants. Because these requirements were not shown to be related to the successful performance of the job for which the applicants were being considered, this Court held that the employer violated Title VII by maintaining these requirements, even though the employer did not intend to discriminate against Blacks. This Court stated that, "If an employer practice which operates to exclude Blacks cannot be shown to be related to job performance, the practice is prohibited." (at 431).

While this Court in *Griggs* found that the requirements *were unrelated to measuring job performance, and, therefore, discriminatory,* this Court stated that

[8] The *amicus* has provided relevant examples of the cost factor in Appendix A of this brief It is beyond dispute that inclusion of pregnancy disability in private insurance plans will increase the cost of coverage. Consequently, an individual employer should not be required to demonstrate the extent of this increase to him before being able to lawfully exclude pregnancy from his benefit program.

nothing in the Act prevents an employer from using tests which relate to job performance, and employers may require applicants to be fit for the job. In *Jefferson* v. *Hackney,*[9] this Court amplified and interpreted this aspect of *Griggs.* This Court stated, at 549:

> "We have, however, upheld the findings of nondiscriminatory purpose in the percentage reductions used by Texas, and have concluded that the variation in percentages is *rationally related* to the purpose of the separate welfare programs. The Court's decision in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), is therefore inapposite. In *Griggs,* the employment tests having racially discriminatory effects were found not to be job related, and *for that reason were impermissible under the specific language of Title VII of the Civil Rights Act.* Since the Texas procedure challenged here *is related* to the purposes of the welfare program, it *is not* proscribed by Title VI simply because of the variances in the racial composition of different categorical programs." (Emphasis supplied).

[9] 406 U.S. 535 (1972). *Jefferson* involved a state's determination to allocate a fixed pool of welfare money by paying AFDC benefits at 75% of need while paying other insurance programs at a higher percentage, e.g., old age assistance at 100% of need and aid to blind at 95% of need. AFDC recipients challenged this determination by alleging racial discrimination, since the proportion of AFDC recipients who were black or Mexican-American was higher than the proportion of aged, blind or disabled welfare recipients who fell within these minority groups. This Court found no invidious discrimination under the Fourteenth Amendment and said racial discrimination was not proven. This Court did not substitute its judgment for the State's determination on how best to allocate the welfare money, even though different policy judgments were possible, because the State's conclusion that the aged and infirm were less able to bear the hardships of an inadequate living standard than were the young AFDC recipients was reasonable.

In both *Griggs* and *Jefferson* the challenged procedures had racially discriminatory effects. The job testing procedure in *Griggs* violated Title VII because it was not related to job performance. In *Jefferson* the differences in benefit payments did not violate Title VI because it could be reasonably said that these differences in payment were related to the legitimate purposes of the welfare program.[10] *Griggs, Jefferson* and *Aiello* have an apparent consistency: when conduct challenged as discriminatory has a relationship to legitimate goals, it will not automatically be found to have violated the Constitution or equal opportunity statutes.

Here, just as in *Aiello,* the pregnancy exclusion is reasonably related to the legitimate design of the insurance program. Thus, it must be kept in mind that when an employer has only a finite amount of money to expend on coverage for employees of both sexes, he must be accorded the right to determine how to utilize those funds most effectively for the benefit of all.[11]

---

[10] In *Jefferson,* a Title VI case, this Court utilized a test virtually identical to that employed in *Griggs* involving Title VII to determine the legitimacy of challenged conduct. The logic of this consistency is evident, since whether challenged conduct is related to legitimate objectives is a question of fact, and therefore it is reasonable to employ the identical criteria to resolve this question whether Title VI or VII is involved. Similarly, the question of whether employer conduct amounts to proscribed sex discrimination is first one of fact. Accordingly, it is logically sound to find that prohibited sex discrimination under Title VII can occur only in those circumstances where it would arise under Amendment Fourteen.

[11] *Local 189 United Paper Makers and Paper Workers* v. *United States,* 416 F.2d 980, 992 (CA 5, 1969) quoted in *Newman* v. *Delta Air Lines,* 374 F. Supp. 238, 7 F.E.P. Cases 26 (N.D. Ga., 1973). "[W]hen the defendant's conduct evidences an economic purpose there is no discrimination under Title VII . . . "

Furthermore, while *Griggs* required that employers justify their challenged conduct by showing business necessity, that standard should not be applied in this case . In the first place, *Griggs* involved discrimination between *different* races; in the area of pregnancy fringe benefits the sexes are not similarly situated and, as *Aiello* held, and part A of this brief contends, a policy excluding pregnancy benefits does not, therefore, constitute illegal sex discrimination. Second, the effect of the employment requirements in *Griggs* was to deny a large segment of the population of a North Carolina county employment opportunities. These requirements caused discrimination and had a pervasive effect against virtually the entire black population of that county because they did not have the educational background to meet the employer's requirements. Here, just as in *Aiello,* the exclusion from benefit programs of pregnancy benefits adversely affects only a portion of one sex some of the time while at the same time having a salutary effect on members of that sex generally as well as on all other employees. Just as in *Aiello* and unlike *Griggs,* the exclusion here will result in reducing the plan's cost and therefore to afford other benefits to both women and men which would be otherwise unavailable.[12]

C. The EEOC's Sex Discrimination Guidelines Are Invalid and Are Entitled to No Weight.

1. Aiello Repudiated These Guidelines.

This Court's opinion in *Aiello* indicates that it will not uphold EEOC guidelines that mechanically equate differential treatment of pregnancy with statu-

---

[12] See Appendix A to this brief.

torily proscribed sex discrimination.[13] Thus, the *Aiello* dissent expressly relied upon these guidelines to support *its* contention that the mere exclusion of disabilities inextricably linked to one sex inevitably constitutes sex discrimination. As stated, the majority rejected this argument and instead found that the exclusion of pregnancy does not constitute proscribed sex discrimination, since this exclusion does not affect women in an area where they are similarly circumstanced with men. This finding, applicable to cases arising under Title VII as well as those under the Fourteenth Amendment, in and of itself demonstrates that this Court has repudiated the EEOC's pregnancy guidelines.

Furthermore, the *Aiello* Court observed that the exclusion of pregnancy fostered the State's legitimate interest in establishing a benefit program that would function in accordance with insurance concepts and in maintaining the fiscal integrity of this program. It is transparent from reading the EEOC's guidelines relevant to this case, that *they* do not permit an evaluation of cost considerations in determining whether the exclusion of pregnancy from a disability plan is legitimate. Thus, in finding that distinctions involving pregnancy do not constitute proscribed sex discrimination and that cost considerations are relevant in determining the legality of a pregnancy benefit exclusion, *Aiello* has unequivocally repudiated these guidelines.[14]

---

[13] Section 1604.10, effective April 5, 1972.

[14] As urged, there is nothing in *Aiello* to suggest that cost considerations for excluding pregnancy will be evaluated *only* when a *governmental* benefit plan is involved. Rather, this Court's reference to "insurance concepts" signifies that this Court will consider such matters when a similar exclusion in private plans is involved.

2. Independent Considerations Demonstrate These Guidelines Are Invalid.

There are additional reasons wholly apart from those considered by the *Aiello* court that establish the invalidity of the pregnancy guidelines. Thus, the guidelines are inconsistent with prior opinions, were not issued when Title VII was enacted, and demonstrate none of the thoughtfullness commonly associated with agency expertise.[15]

a. The Commission's sex discrimination guidelines do not constitute a contemporaneous construction of Title VII.

A brief odyssey through the Commission's pronouncements on fringe benefits and pregnancy is necessary to fully appreciate the explicit inconsistency of the Commission's position.

Between 1966, shortly after Title VII became effective,[16] and 1969 the Commission issued a number of opinions announcing how it would apply Title VII when encountering the issue of fringe benefits and pregnancy. These opinions reveal a consistency of approach to this issue and generally informed employers that *they were not required to provide the same fringe benefits for pregnancy as they provided for illness or injury.*

---

[15] These factors commonly have been examined by courts in evaluating the weight to be given to administrative guidelines. *Espinoza* v. *Farah Manufacturing Co., supra; Skidmore, et al.* v. *Swift and Co.,* 323 U.S. 134 (1944); Davis, *Administrative Law Text,* Section 5.03 (1959).

[16] Title VII of the Civil Rights Act of 1964 was enacted on July 2, 1964, with an effective date of July 2, 1965.

For example, in an opinion letter, dated November 15, 1966, sixteen months after Title VII became law, the Commission's General Counsel stated:

"Gentlemen:

You state that under your collective bargaining agreement *male and female employees are granted sick leave with pay. Female employees, however, are granted maternity leaves without pay;* although their services are not terminated. You inquire whether this policy is in compliance with Title VII of the Civil Rights Act of 1964.

The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. Accordingly, we believe that to provide substantial equality of employment opportunity for both sexes, there must be special recognition for absence due to pregnancy, and for this reason have stated that, generally speaking, a leave of absence should be granted for pregnancy whether or not it is granted for illness. On the other hand, we do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness, and, consequently, it is our view that the policy you describe is not in violation of Title VII.

Sincerely yours,

/s/ CHARLES T. DUNCAN
Charles T. Duncan
General Counsel"
(November 15, 1966)
(emphasis supplied) [17]

[17] The General Counsel promulgated virtually identical statements in November and December, 1966. See, e.g., CCH Employment Practices 12-21-66, paragraph 17,304.43.

Within sixteen months after the enactment of Title VII, then, the Commission had advised employers that they need not "provide the same fringe benefits for pregnancy as [they provided] for illness . . ." and that the Commission did not require comparable treatment for illness and pregnancy.

The Commission, still demonstrating consistency, maintained this position through 1969. On June 19, 1969, a representative of the Commission announced that the Commission "views pregnancy as a temporary disability, and has not to date equated it with sickness." The Commission then ruled that an employer *may grant maternity leave without pay even though it provided pay for sick leaves.*[18]

The Commission's consistency came to an abrupt halt on April 5, 1972. Then for the first time the Commission declared in an opinion guideline that pregnancy and illness were the same after all for the purposes of an employer's disability policy.[19] The 1972 opinion, of

[18] CCH, New Developments Paragraph 8804, EEOC Attorney Discusses Sex Discrimination and Fringe Benefits Under Title VII, 1964 Civil Rights Act.

[19] Whether expressed in a guideline, letter or reported investigation of a specific charge, the Commission's statements and views are merely its *opinions* concerning *inter alia* whether particular conduct violated Title VII. Any so called "EEOC decisions" which may concern the subject in question are not, therefore, decisions at all, but merely reported investigations following a charge, and the report contains the investigators' or prosecutors' opinion that "reasonable cause" does or does not exist to believe Title VII has been violated. Moreover, the so called "decisions" have been of even less value than the guidelines. While a guideline is the expression of a current opinion by the administrator on the meaning of the statute, a reported investigation states merely that based on the *facts then present* in that case there is or is not *reasonable cause* to believe that the Act has been violated. Arguments or

course, has not been consistently applied for a long period of time because it is only the most recent Commission view on the subject, and because it is totally and remarkably inconsistent with prior opinions issued over the last several years. Moreover, it is these prior opinions, rather than 1972 opinion, that are contemporaneous constructions of Title VII.[20] What weight then can be given to this 1972 opinion? Applying the criteria of consistent application and contemporaneous construction, the answer is, "none". Moreover, the answer does not change when other relevant criteria are applied.

b. The pregnancy guidelines were not issued with the evident thoughtfulness that marks agency expertise.

There is no evidence that the 1972 guidelines were formulated with consideration for alternative ramifications.[21] Moreover, when the Commission, after several

reasons advanced as the case progresses can alter the opinion, and it is of little guidance unless a subsequent case is factually "on all fours". *Robinson* v. *Lorillard Corporation*, 444 F.2d 791, 801 (CA 4, 1971). Thus, while the arguments in this brief are directed primarily against the Commission's 1972 guideline opinion, these arguments, here and elsewhere, may apply equally to any investigation reports that may represent a change in direction by the Commission.

[20] Since the opinion letters referred to in the test represent contemporaneous interpretations of Title VII and are consistent with each other, it is these letters, rather than the guideline in question that are entitled to judicial deference. *Williams* v. *New Orleans Steamship Assn.*, 341 F. Supp. 613 (E.D. La., 1972); *N.L.R.B.* v. *Boeing Co.*, 412 U.S. 61 (1973).

[21] The pregnancy guidelines are distinguishable from those considered in *Albemarle Paper Co.* v. *Moody*, 43 U.S.L.W. 4880 (June 25, 1975). The guidelines considered in *Albemarle* were found to have drawn upon the professional standards of test validation established by the American Psychological Association (at 4888).

Here, by contrast, the guidelines at issue were promulgated

years of consistently applying the Act, abruptly changed its interpretation and consequent application of the Act, it must prove clearly and convincingly that its new interpretation is justified by a change in Congressional policy or by new facts not previously in existence.[22] Only if it meets this explicit proof burden is its new opinion entitled to any judicial consideraton. The Commission has offered no such proof here. Indeed, its astonishing and erratic shift belies its obvious claim of expertise.

This much, then, is now clear. In evaluating the weight to give an agency's opinion as to the meaning of a statute, the courts commonly consider a variety of factors. When the Commission's 1972 guidelines concerning fringe benefits and pregnancy are viewed

without expert advice or outside testimony. Thus, the Commission did not hold public hearings concerning the impact of the new guidelines on the business community. See Deposition of Ms. Sonia P. Fuentes, Chief of the Legislative Counsel Division of the Commission when the new guidelines were published. An abstract of this deposition appears in the Brief for Delta Air Lines at 25, 26 in *Cohen* v. *Chesterfield County School Board*, — U.S. — (1974).

Public hearings appear to be mandated by the APA, § 4, 5 U.S.C. § 553 (1970), where, as here, a governmental agency substantially changes its position, even though the Commission in what appears to be an effort to escape such hearings, characterized its guidelines as "interpretative" rather than substantive rules. *Columbia Broadcasting Sys., Inc.* v. *U.S.*, 316 U.S. 407, 416 (1942). Since the Commission exceeded its power by promulgating these guidelines without public hearing, this Court should disregard them.

[22] *Newman* v. *Delta Air Lines, Inc., supra.* There, the court held that the guideline here in question was not binding on the court because there appeared to be no factual basis upon which the guideline was drawn. The Court also found that the denial of employment benefits to employees on maternity leave did not violate Title VII.

in light of these factors, it is clear that these guidelines are entitled to neither weight nor deference.

After promulgating the challenged guidelines, the Commission apparently hoped to rely upon *Griggs* to secure prompt judicial approval. However, *Griggs* is distinguishable and, indeed, supports the view that the guidelines in question are entitled to no weight. In the first place, the statement by this Court in *Griggs* that agency guidelines were entitled to "great deference"[23] must not be overvalued, but rather should be confined to the facts of that case. As the Sixth Circuit in *Espinoza* v. *Farah Manufacturing Co.*, observed:

> "In Griggs, the Court found that '(s)ince the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.' 401 U.S. at 434. Moreover, in that case the Court made an independent analysis of the peritnent legislative history and decided that 'the conclusion is inescapable that the EEOC's construction. . . . comports with Congressional intent.' 401 U.S. at 436"[24]

This Court in *Espinoza* adopted the logic of this statement.

Here, unlike *Griggs* and contrary to the court below, there is no evidence whatever that Congress intended an employer to provide fringe benefits for pregnancy

---

[23] at 433-434.

[24] *Espinoza* v. *Farah Manufacturing Co.*, 462 F.2d 1331, 1334 (CA 6, 1972).

on the same terms as he provides benefits for illness or to treat these distinct conditions in the same manner.[25]

In addition, when *Griggs* was decided the Commission did not have prosecutorial powers. These powers were accorded to the Commission on March 24, 1972. Yet while giving these new prosecutorial powers to the Commission, Congress did not accord to the Commission the power to make substantive law. The relevant legislative history leaves room for no reasonable

---

[25] There was little or no legislative history on sex discrimination. *Newman* v. *Delta Air Lines, Inc., supra.* However, Congress had ample precedent had it desired to require an employer to treat pregnancy and illness in the same manner. In 1968, considering the Railroad Unemployment Insurance Act of 1946, Congress amended the definition of a day of sickness in that Act to include with respect to "a female employee, a calendar day on which because of pregnancy, miscarriage, or the birth of a child (i) she is unable to work or (ii) working would be injurious to her health." (45 U.S.C. 351(k)(z)).

It is apparent, therefore, that had Congress desired to amend the Civil Rights Act in 1972 or at any time to require employers to treat pregnancy and illness in a similar manner when formulating or implementing benefit programs, Congress would have enacted such an amendment. See footnote 4, *supra.*

Indeed, inasmuch as the legislative history of subsequent legislation is accorded weight in determining intendment of earlier legislation involving the same subject (*Glidden Company* v. *Zdanok*, 370 U.S. 530, 541 (1962)), Congressional commentaries encompassing the ERA are relevant here. These commentaries demonstrate that in fashioning the ERA, Congress did not intend to preclude regulations based upon the unique physical characteristics of one sex. Thus, a law relating to pregnancy covers only women and therefore under the amendment does not deny equal rights to men. (H.R. Rep. No. 92-359, 92nd Cong., 1st Sess. 7 (1971), S. Rep. No. 92-689, 92nd Cong., 1st Sess. 12 (1972), 117 Cong. Rec. H 9368 (daily ed. Oct. 12, 1971). Accordingly, it may be presumed that Congress does not intend to foreclose the regulation of pregnancy benefits or brand exclusion of these benefits from insurance plans as unlawful sex discrimination.

doubt, since in Section 713(a) of Title VII (42 U.S.C. 2000e-2000e-12(a)), the word "procedural" was inserted by amendment on the floor of the House to make clear that the Commission did not have the power to make substantive regulations.[26]

The Commission was rather required to prosecute its cases in a federal district court, and it is the courts that are to interpret the Civil Rights Act and apply the law. There is no doubt that Congress can bestow upon an agency the power to make substantive law. The National Labor Relations Board is an example of an agency to which Congress has given the power to make such law. Within the statutory framework of the National Labor Relations Act, the General Counsel and the Board itself have the power to create a substantial body of labor law and courts have justifiably deferred to the Board's expertise.[27] Because the Commission has not been given the power to create substantive law, its guidelines may now inform the public of what the prosecutor considers illegal, but there is no reason for a court to accord the prosecutor's views a special sanctity or to view them as a body of law having binding force. The Commission's opinions are just that—its view of what constitutes illegal conduct—and a court should treat them as nothing else. The Commission, like the Justice Department, has been accorded only prosecutorial functions, and like the Justice Department cannot fashion the law it elects to present. This is the fundamental distinction between agencies given only prosecutorial roles and those, such as the National Labor Relations Board, to which Con-

[26] 110 Cong. Rec. 2575.

[27] The Board's rules concerning what constitutes an effective contract bar to a representation election are one example.

gress has given adjudicative and regulatory functions as well as prosecutorial duties. When dealing with the Commission in its new prosecutorial function, the court has the ultimate responsibility to determine the law and it must not abdicate this responsibility to the prosecutor by deference to his guidelines.

CONCLUSION

For all the foregoing reasons, the *amicus* urges that this Court reverse the decision of the court below.

Respectfully submitted,

MILTON A. SMITH
General Counsel
RICHARD B. BERMAN
Labor Relations Counsel,
CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA
1615 H Street, N.W.
Washington, D. C. 20006

GERARD C. SMETANA
JERRY KRONENBERG
JULIAN D. SCHREIBER
BOROVSKY, SMETANA, EHRLICH
& KRONENBERG
2011 Eye Street, N.W.
Suite 800
Washington, D. C. 20006

Attorneys for the Amicus Curiae

APPENDIX

APPENDIX A

The Chamber has learned of the following facts and presents them to this court for its consideration.

The Health Insurance Association of America and the American Life Insurance Association, representing approximately 500 life and health insurance companies and accounting for approximately 90% of the total private health and life insurance programs in force in the United States, have stated:

> "Under a typical disability income plan with an average group of employees [assuming 38% to 40% are women], the addition of a disability income benefit to cover maternity absences would result in an additional cost to the employer of about 40 to 50 percent of his current costs for the plan." (Joint comments filed in response to a proposal by the Office of Federal Contract Compliance to require that federal contractors provide disability benefits for workers absent from work due to pregnancy, 38 Fed. Reg. 35336-35338 (December 27, 1973); Comment at 9 (February 11, 1974) (Reply brief for Appellant, page 18, *Geduldig* v. *Aiello*, *supra*.

The experience of one major employer, American Telephone and Telegraph Company, confirms the validity of the foregoing statement. Based upon its calculations, considering the average salary and seniority of eligible women, costs for disability benefits would have been increased by $15,762,663 in 1970-71 and $19,037,330 in 1971-72 if pregnancy had been covered. These estimates include only basic disability costs and exclude such wage related costs as social security, pension, health insurance, etc. The estimate assumes an average pregnancy disability of eight weeks. Costs would have increased respectively to $32,739,007 and $39,539,070 if payment for the full average maternity leave period of five and one-half months had occurred.

Moreover, if pregnancy had been included in the survey years, 21% of the total days for which disability payments

were made would have been attributable to 5% of the eligible women or 2.5% of the employer's working force. No other disability group, even considering both sexes, could generate such a great number of disability days for which benefits would be paid. (Page 11 in Brief of American Telephone and Telegraph Company as *amicus curiae* in *Geduldig* v. *Aiello, supra.*)

The State of California's experience under its unemployment insurance code is consistent with the foregoing. Women presently receive $1.27 in benefits for each $1.00 contributed while men receive $.80. The addition of benefits for normal pregnancy, assuming that contributions did not increase nor benefits decrease, would cause the female benefit rate to increase to $2.33 while the male rate would remain at $.80. (According to the State, in order to preserve the fiscal integrity of its program, contributions would have to increase or benefits decrease; in either event the benefit ratio between men and women would remain the same.) The experience of the State of Hawaii is similar. Coverage of pregnancy under the State's disability program has caused disability premiums for females to increase from $4.00 per month to $8.76 per month. (Reply brief for the Appellant, pages 17-21 in *Geduldig* v. *Aiello, supra.*)

Supreme Court, U. S.
FILED
AUG 27 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A Corporation,

Petitioner,

vs.

SANDRA WETZEL and MABI ROSS, on behalf of Themselves and All Others Similarly Situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR NEW YORK STATE DIVISION OF HUMAN RIGHTS AS AMICUS CURIAE

HENRY SPITZ, *General Counsel*
State Division of Human Rights
270 Broadway
New York, New York 10007
Attorney for Amicus Curiae
(212) 488-5377

ANN THACHER ANDERSON
PAUL HARTMAN
Of Counsel

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906
(4482)

TABLE OF CONTENTS

	PAGE
Interest of the Amicus	1
Prior Opinions	5
Jurisdiction	5
Statute Involved	5
Question Presented	5
Point I—Nothing in *Geduldig* v. *Aiello* invalidates the decision below or the administrative guidelines therein sustained	6
Point II—*Griggs* v. *Duke Power Co.* furnishes the appropriate test for reviewing the decision below	15
Conclusion	21

TABLE OF AUTHORITIES

Cases: PAGE

Armour & Co. v. Wantock, 323 U.S. 126 (1944, *rehearing denied,* 323 U.S. 818 (1945) 9

Bd. of Educ. v. Div. of Human Rights, 42 App. Div. 2d 48 (Second Dept. 1973), *affirmed,* 35 N.Y.2d 673 (1974) 2
Board of Education of the City of New York v. State Division of Human Rights, 42 App. Div. 2d 854 (Second Dept. 1973), *affirmed,* 35 N.Y.2d 675 (1974) 2
Board of Education of Union Free School District No. 22 v. State Division of Human Rights, 42 App. Div. 2d 600 (Second Dept. 1973), *affirmed,* 35 N.Y. 2d 677 (1974) 2

Cedar Rapids Community School District v. Parr, 227 N.W.2d 486 (Iowa 1975) 11, 19
Cohens v. Virginia, 6 Wheat. (U.S. 1821) 9
Communications Wkrs. v. American T. & T. Co., L.L. Dept., 513 F.2d 1024 (2d Cir. 1975), petition for cert. filed, 43 U.S.L.W. 3684 (June 19, 1975), *reversing* 379 F. Supp. 697 (S.D.N.Y. 1974) 9, 10, 13
Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 12

Dessenberg v. American Metal Forming Co., 8 CCH E.P.D. ¶9575 (N.D. Ohio 1973) 19

Espinoza v. Farah Manufacturing Company, 414 U.S. 86 (1973) 18

Farkas v. South Western City School Dist., 8 CCH E.P.D. ¶9619 (S.D. Ohio 1974), *affirmed,* 506 F.2d 1400 (6th Cir. 1974) 19

PAGE

Geduldig v. Aiello, 417 U.S. 484 (1974) 2, 3, 6, 7, 8, 10, 11, 14, 15
Gilbert v. General Electric Company, 375 F.Supp. 367 (E.D. Va. 1974), *affirmed,* —— F.2d ——, BNA Daily Labor Report No. 126, D-1 (4th Cir. 1975), *petition for cert. filed,* 43 U.S.L.W. 3675 (June 17, 1975) 10, 19
Goerart v. Cleary, 335 U.S. 464 (1948) 13
Goodyear Tire & Rubber Co. v. Rubber Workers Local 200, 8 CCH E.P.D. ¶9657 (Ohio Ct. App. 1974) 19
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 8, 11, 15, 16, 17, 21

Humphrey's Executor v. United States, 295 U.S. 602 (1935) 10

Kahn v. Shevin, 416 U.S. 351 (1974) 12
Krause v. Sacramento Inn, 479 F.2d 988 (9th Cir. 1973) 13

Lillo v. Plymouth Local Bd. of Educ., 8 CCH E.P.D. ¶9510 (N.D. Ohio 1973) 19

Muller v. Oregon, 208 U.S. 412 (1908) 12

Newmon v. Delta Airlines, Inc., 475 F.2d 768 (5th Cir. 1973), *remanded and final order entered,* 374 F. Supp. 238 (N.D. Ga. 1973) 19

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) 8
Potlatch Forests, Inc. v. Hays, 318 F.Supp. 1368 (E.D. Ark. 1970), *affirmed,* 465 F.2d 1081 (8th Cir. 1972) 20

Railway Mail Association v. Corsi, 326 U.S. 88 (1945) 4
Ray-O-Vac v. Wisconsin Dept. of Industry, Labor and Human Relations, 8 CCH E.P.D. ¶9656 (Wis. Cir. Ct. 1974) 19

PAGE

Richards v. Griffith Rubber Mills, 300 F.Supp. 338 (D. Ore. 1969) 13-14
Robinson v. Lorillard Corporation, 444 F.2d 791 (4th Cir. 1971) 20

Sale v. Waverly-Shell Rock Board of Education, 390 F. Supp. 784 (N.D. Iowa 1975) 10-11, 19
Satty v. Nashville Gas Company, 384 F. Supp. 765 (M.D. Tenn. 1974) 11
Schattman v. Texas Employment Commission, 459 F. 2d 32 (5th Cir. 1972) 13

Udall v. Tallman, 380 U.S. 1 (1965) 18
Unemployment Comm. v. Aragon, 329 U.S. 143 (1946) 18
Union Sch. Dist. v. Human Appeal Bd., 35 N.Y.2d 371 (1974), *reargument denied*, 36 N.Y.2d 807 (1975) 2, 3, 11, 19
United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392 (1965) 10
United States v. Neifert-White Co., 390 U.S. 228 (1968) 10

Vick v. Texas Employment Commission, 6 CCH E.P.D. ¶8933 (S.D. Tex. 1973) 13, 19
Vineyard v. Hollister Elementary School District, 64 F.R.D. 580 (N.D. Cal. 1974) 10, 19

Weeks v. Southern Bell Telephone and Telegraph Company, 408 F.2d 228 (5th Cir. 1969) 13
Weinberger v. Wiesenfeld, —— U.S. ——, 95 S.Ct. ——, 43 L.Ed. 2d 514 (1975) 20
West Coast Hotel v. Parrish, 300 U.S. 379 (1937) 12
Wetzel v. Liberty Mutual Ins. Co., 372 F.Supp. 1146 (W.D. Pa. 1974), *reargument denied*, 372 F.Supp. 1163 (W.D. Pa. 1974), *affirmed*, 511 F.2d 199 (3d Cir. 1975), *cert. granted*, —— U.S. —— (May 27, 1975) 5, 14
Williamson v. Lee Optical Co., 343 U.S. 483 (1955) 6

Constitutions & Statutes: PAGE

Equal Protection Clause, U.S. Const. XIV Amend. ..6, 12, 13

N.Y. Const. Art. I §11 1

Age Discrimination in Employment Act, 81 Stat. 602, 29 U.S.C. §621 ff. 12

Equal Pay Act, 77 Stat. 56, 29 U.S.C. §206(d) 12

Rehabilitation Act of 1973, 87 Stat. 355, 29 U.S.C. §701 ff. 12

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. §2000e *et seq.* as amended by Equal Employment Opportunity Act of 1972, 86 Stat. 103 .... 3, 4, 5, 8, 10, 12, 13, 15, 17, 18

28 U.S.C. §1254(1) 5

N.Y. Disability Benefits Law (Workmen's Compensation Law Art. 9) ..... 3 fn.

N.Y. Executive Law Art. 15 2

L. 1945 ch. 118 1

L. 1965 ch. 516 2

Regulations:

EEOC Guidelines as to Sex Discrimination, 29 C.F.R. §1604 ..... 3, 4, 8, 10, 17

N.Y. State Division of Human Rights, Rulings on Inquiries (September 1973) 3, 4

Miscellaneous: PAGE

EEOC 5th Annual Report 18

EEOC 6th Annual Report 18

H.R. Rep. No. 92-238, 92nd Cong. 1st Sess. (1971) as set out in 2 U.S. Code Cong. & Adm. News 2137 (1972) 17

Note, "*Geduldig* v. *Aiello*: Pregnancy Classifications and the Definition of Sex Discrimination," 75 *Colum. L. Rev.* 441 (1975) 11, 17-18

N.Y. Times, March 20, 1975 p. 1 col. 2-4 20

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A Corporation,

Petitioner,

vs.

SANDRA WETZEL and MARI ROSS, on behalf of Themselves and All Others Similarly Situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR NEW YORK STATE DIVISION OF HUMAN RIGHTS AS AMICUS CURIAE

Interest of the Amicus

The New York State Division of Human Rights is the nation's oldest fair employment practices agency. The Division was created in 1945 in exercise of the state's police power for the protection of the public welfare, health and peace of its people, and in fulfillment of the provisions of the Constitution of the State of New York, N.Y. Const. Art. I, §11, concerning civil rights. L. 1945 ch. 118. Over

the years the jurisdiction of the Division has been enlarged; the Division's jurisdiction over sex discrimination derives from legislation which became effective September 1, 1965. L. 1965 ch. 516. The opportunity to obtain employment without such discrimination has been declared a civil right. N. Y. Executive Law Art. 15 (known as the Human Rights Law) §291.1. The Division's jurisdiction over sex discrimination in employment covers hiring, discharge, and terms, conditions and privileges of employment, including compensation. Human Rights Law §296.1(a).

The Division has published rulings under the Human Rights Law which equate with discrimination based on sex an employer's differentiating between employees on the basis of pregnancy. These rulings include provisions designedly resembling the guidelines of the EEOC which are in issue here. The Court of Appeals of the State of New York has unanimously sustained that interpretation of the statute. *Union Sch. Dist.* v. *Human Appeal Bd.*, 35 N.Y.2d 371 (1974), *reargument denied*, 36 N.Y.2d 807 (1975); *Bd. of Educ.* v. *Div. of Human Rights*, 42 App. Div. 2d 49 (Second Dept. 1973), *affirmed*, 35 N.Y. 2d 673 (1974); *Board of Education of Union Free School District No. 22* v. *State Division of Human Rights*, 42 App. Div. 2d 600 (Second Dept. 1973), *affirmed*, 35 N.Y.2d 677 (1974); *Board of Education of the City of New York* v. *State Division of Human Rights*, 42 App. Div. 2d 854 (Second Dept. 1973), *affirmed*, 35 N.Y. 2d 675 (1974).

In the first-cited case, the court held the decision of this court in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), "irrelevant" to the question whether an employer may dis-

allow accrued sick leave to an employee disabled by childbirth. 35 N.Y. 2d at 376.

All the cases cited above were decided after *Geduldig* v. *Aiello, supra,* and after argument as to its impact. They upheld orders of the Division directing employers to allow employees to continue working during pregnancy until the onset of actual physical disability, to return to employment upon recovery from such disability, and to receive accrued sick leave, disability benefits and other fringe benefits during the period of actual disability. The courts of the State of New York have thus agreed with the Division's ruling that differentiation by an employer between employees on the basis of pregnancy or maternity, whether as to commencement or continuance of leave or as to allowance of fringe benefits, including disability benefits,* constitutes discrimination as to sex.

The Division argues in this brief that the court below was correct in reading the decision of this Court in *Aiello* not to preclude a finding that an employer who excludes maternity-related disabilities from contractual benefits violates Title VII. The interest of the Division in this proceeding, however, goes beyond *Aiello*. Even if this Court should reverse the decision below, the Division is bound by the decisions cited above, and will therefore persist in equating with discrimination as to sex an employer's differentiation between employees on the basis of pregnancy or maternity. In so persisting, the Division will

* Presently before the Appellate Division is the question whether exclusion of pregnancy-related disabilities from the New York Disability Benefits Law, Workmen's Compensation Law, Art. 9, precludes a finding that an employer's disallowance of contractual disability benefits to an employee disabled by pregnancy violates the Human Rights Law.

reflect the State's determination, expressed in the Human Rights Law and in authoritative interpretation of that Law, "to extend the area of non-discrimination beyond that which the Constitution itself exacts", Frankfurter, J., concurring, in *Railway Mail Association* v. *Corsi,* 326 U.S. 88, 98 (1945).

Reversal by this Court of the decision below, however, would preclude the Federal courts and the Equal Employment Opportunity Commission from making the same equation in interpreting and applying Title VII. The consequences would be anomalous and unfortunate: Title VII, although similar to the Human Rights Law in terms, purpose and legislative intent, would have to be read differently. Its prohibitions against discrimination as to sex could not be applied to employers reducing or curtailing fringe benefits for employees disabled by reason of maternity. The Division would possess wider enforcement power over sex discrimination than the Federal government. This anomaly would confuse and inconvenience employers as well as persons claiming to be aggrieved of such discrimination. And if this Court were to strike down the guidelines of the EEOC requiring equal treatment of maternity-related disabilities and other disabilities, this would adversely affect the Division's strong reliance upon those guidelines in the interpretation and application of its own statute. Having based its own rulings upon those guidelines, the Division has an interest in their being sustained by this Court.

Prior Opinions

The opinion of the Court of Appeals for the Third Circuit is reported at 511 F.2d 199 (1975).

The opinion of the District Court for the Western District of Pennsylvania is reported at 372 F.Supp. 1146 (1974). The memorandum order of that court denying petitioner's motion for reconsideration is reported at 372 F.Supp. 1163 (1974).

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit affirming the judgment of the District Court of the Western District of Pennsylvania was entered on February 11, 1975. The petition for writ of certiorari was filed on April 2, 1975 and granted on May 27, 1975. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Statute Involved

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, Act of July 2, 1964, 78 Stat. 253, 42 U.S.C. §2000e-2(a)(1).

Question Presented

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1), is violated by a private employer which provides wage maintenance for nonoccupational disabilities of employees, but excludes from coverage disabilities caused by or related to pregnancy.

POINT I

Nothing in *Geduldig* v. *Aiello* invalidates the decision below or the administrative guidelines therein sustained.

In *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), this Court upheld under the Equal Protection Clause of the Fourteenth Amendment a state statute providing an employee-funded program of disability benefits which excludes disabilities relating to normal pregnancy. The majority regarded the statutory exclusion of such disabilities as constitutionally permissible, and held that, consistently with the Equal Protection Clause, a state which enacts remedial legislation or establishes a social welfare program may, in the words of *Williamson* v. *Lee Optical Co.*, 343 U.S. 483, 489 (1955), "take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" and may "select one phase of one field and apply a remedy there, neglecting the others." The cost of adding to the statutory coverage disabilities relating to normal pregnancy was found by the majority to constitute a rational basis for the exclusion. 417 U.S. at 495. The majority noted the state's legitimate interest in maintaining the self-supporting nature of its insurance program, in distributing adequate benefits for those disabilities within coverage, rather than covering all disabilities inadequately, and in maintaining a contribution rate at a level that would not unduly burden participating employees, and declared these policies to provide "an objective and wholly noninvidious basis for the State's decision not to create a more comprehensive insurance program than it has." 417 U.S. at 496. Finding

no evidence that the selection of risks insured by the program worked to discriminate against any definable group or class "in terms of the aggregate risk protection derived by that group or class from the program", the majority went on to say:

> "The dissenting opinion to the contrary, this case is * * * a far cry from cases like *Reed* v. *Reed* and *Frontiero* v. *Richardson* involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex based classification like those considered in *Reed* and *Frontiero*. normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.
>
> "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes." 417 U.S. 496 n. 20 (citations omitted.)

The majority opinion found in the California program "no risk from which men are protected and women are not." 417 U.S. at 496-7.

Petitioner argues that the majority opinion in *Aiello* furnishes the appropriate test for determining whether petitioner's wage maintenance plan is discriminatory as to sex. Petitioner argues, further, that its plan passes that test.

Aiello, however, is a pronouncement as to the constitutionality of a statutory classification in benefits legislation, not an interpretation or application of Title VII or other fair employment legislation. *Aiello* declares that a state legislature in framing an employee-funded program of benefits for non-occupational disabilities, may regard pregnancy as a legitimate, constitutionally permissible classification, and may either include or exclude pregnancy-related disabilities. *Aiello* does not reach the question whether under fair employment legislation, the constitutionality of which is not in question, an employer may differentiate as to fringe benefits between employees who are pregnant and those who are not. *Aiello* did not arise under fair employment legislation or deal with a practice within any employer's control. *Aiello* does not overrule or modify the leading interpretations of Title VII, *e.g. Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), or *Phillips* v. *Martin Marietta Corp.,* 400 U.S. 542 (1971). *Aiello* does not even refer to Title VII or to the guidelines of the EEOC prohibiting employers from providing less favorable benefits for employees disabled by pregnancy than for employees disabled by illness or injury.

As the Second Circuit recognized in *Communications Wkrs.* v. *American T. & T. Co., L.L. Dept.,* 513 F.2d 1024, 1028 (1975), *petition for cert. filed,* 43 U.S.L.W. 3684 (June 19, 1975), *reversing,* 379 F. Supp. 697 (S.D.N.Y. 1974), words in the opinions of this Court must be read in their proper factual context. *E.g., Cohens* v. *Virginia,* 6 Wheat. 264, 399-400 (U.S. 1821) (Marshall, C.J.):

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

More than a century later, Justice Jackson, writing for a unanimous court in *Armour & Co.* v. *Wantock,* 323 U.S. 126, 132-3 (1944), *rehearing denied,* 323 U.S. 818 (1945), sounded the same warning:

> "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading."

See also *Humphrey's Executor* v. *United States*, 295 U.S. 602, 626 (1935); *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 404 (1965); *United States* v. *Neifert-White Co.*, 390 U.S. 228, 231 (1968).

On these authorities, the Second Circuit refused to read *Aiello* as adjudicating the responsibilities of an employer under Title VII towards employees disabled by pregnancy or childbirth. *Communications Wkrs.* v. *American T. & T. Co., L.L. Dept., supra.* The court said, Bryan, J., 513 F.2d at 1030:

> "If, as the district court below thought, *Aiello* was a definitive holding that, absent mere pretext, disparity of treatment of pregnancy-related disabilities could not constitute a violation of Title VII, *Aiello* would substantially circumscribe the reach of that Act of Congress and would invalidate the guidelines as to treatment of pregnancy disabilities issued by the EEOC. It is inconceivable that the majority opinion intended so to hold without even a mention of Title VII or the guidelines."

The Division respectfully submits that the decision of the Second Circuit is correct, reinforces the decision below, and should be followed by this Court.

Other Federal courts agree with the Second and Third Circuits that *Aiello* does not reach Title VII or the guidelines issued by the EEOC. *Gilbert* v. *General Electric Company*, 375 F. Supp. 367 (E.D. Va. 1974), *affirmed*, —— F.2d ——, BNA Daily Labor Report No. 126, D-1 (4th Cir. 1975), *petition for cert. filed*, 43 U.S. Law Week 3675 (June 17, 1975); *Vineyard* v. *Hollister Elementary School District*, 64 F.R.D. 580 (N.D. Cal. 1974); *Sale* v. *Waverly-Shell Rock*

Board of Education, 390 F. Supp. 784 (N.D. Iowa 1975); *Satty* v. *Nashville Gas Company*, 384 F. Supp. 765 (M.D. Tenn. 1974). The highest courts of two states have declared *Aiello* "irrelevant" and "factually and rationally distinguishable" in concluding that denial of sick pay and disability benefits to employees disabled by pregnancy and childbirth violates state fair employment legislation. *Union Sch. Dist.* v. *Human Appeal Bd.*, 35 N.Y.2d 371, 376 (1974), *reargument denied*, 36 N.Y.2d 807 (1975); *Cedar Rapids Community School District* v. *Parr*, 227 N.W.2d 486, 494 (Iowa 1975).

Under *Aiello*, a statutory classification as to pregnancy appears presumptively constitutional, and will not be disturbed unless found to be without rational basis or irrelevant to the achievement of some permissible state purpose. This test is more demanding than the test for ascertaining discrimination under a fair employment statute. Under the rule in *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 431, the test for ascertaining statutory discrimination is simply whether the practice "operates to exclude" employees of a particular race, color, religion, sex or national origin, and if so, whether the employer can prove the practice related to job performance or business necessity. The test for statutory violation looks to effect. The test for constitutionality looks to legislative purpose and intent, and does not always include "effect analysis". *Cf.* Note, "*Geduldig* v. *Aiello*: Pregnancy Classifications and the Definition of Sex Discrimination," 75 *Colum.L.Rev.* 441 (1975).

In two recent decisions this Court has demonstrated how wide is the difference between the standard for deter-

mining the constitutionality of a statutory distinction between men and women and the standard for reviewing decisions under fair employment legislation. *Kahn* v. *Shevin*, 416 U.S. 351 (1974), upheld as constitutional a Florida statute allowing a tax exemption to widows but not to widowers. *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974), construed the Equal Pay Act to require an employer to pay female inspectors on the day shift as much base pay as paid to male inspectors on the night shift.

To hold that pregnancy is a classification permissible under the Equal Protection Clause is not to hold either Congress or the EEOC foreclosed from forbidding employers to differentiate between employees who are pregnant and employees who are not. A classification permissible to lawmakers under the Equal Protection Clause in the framing of social welfare legislation can be legislatively forbidden to employers. Much fair employment legislation goes beyond the classifications regarded as suspect under the Equal Protection Clause—race, color, creed—and reaches classifications which are presumptively constitutional. Quite apart from Title VII, the Age Discrimination in Employment Act, 81 Stat. 602, 29 U.S.C. §621 ff., and the Rehabilitation Act of 1973, 87 Stat. 355, 29 U.S.C. §701 ff., forbid employers from differentiating between employees on the basis of age or handicap—classifications which under the Constitution are subject only to limited judicial scrutiny.

Muller v. *Oregon*, 208 U.S. 412 (1908) and *West Coast Hotel* v. *Parrish*, 300 U.S. 379 (1937), which upheld as constitutional protective legislation as to women, did not preclude the Fifth Circuit from declaring discriminatory, and hence invalid under Title VII, sex-based prerequisites for employment. *Weeks* v. *Southern Bell Telephone and Telegraph Company*, 408 F.2d 228 (5th Cir. 1969). *Goesart* v. *Cleary*, 335 U.S. 464 (1948), upholding under the Equal Protection Clause state legislation forbidding women from tending bar, did not preclude a lower Federal court from characterizing an employment policy based on such a statute as patently offensive under Title VII. *Krause* v. *Sacramento Inn*, 479 F.2d 988 (9th Cir. 1973). The holding in *Schattman* v. *Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), that a regulation issued by an employer not then subject to Title VII was permissible under the Equal Protection Clause did not preclude a lower court from subsequently holding the regulation invalid under amendments extending Title VII to cover the employer. *Vick* v. *Texas Employment Commission*, 6 CCH E.P.D. ¶8933 (S.D. Tex. 1973).

In the *Communications Workers* case, *supra*, the Second Circuit said, 513 F.2d at 1031:

> "Title VII is legislation of this nature, designed to prohibit a broad spectrum of discriminatory evils which Congress deemed would have such an adverse effect. There is no requirement that the discriminatory practices forbidden by this Statute should be limited to practices violative of the Equal Protection Clause. Practices forbidden by Title VII and the EEOC guidelines issued thereunder may, nonetheless, be able to survive Equal Protection attack."

See *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338, 340 (D. Ore. 1969), where the court applied Title VII to an

order of the state wage and hour administrator and said: "The particular classification in Order No. 8 may be reasonable under the Equal Protection Clause, but it is no longer permitted under the Supremacy Clause and the Equal Employment Opportunity Act."

The Division respectfully submits that the District Court in this case was correct in stating, 372 F. Supp. at 1159:

> "While a fixed State policy of classification may survive an equal protection attack it may still be violative of Title VII."

Aiello upholds not only the exclusion but also the inclusion of pregnancy within legislative coverage. *Aiello* specifies that lawmakers are Constitutionally free to "include" pregnancy within legislative coverage "on any reasonable basis." 417 U.S. at 496 n.20. Under *Aiello* it is therefore permissible for an administrative agency to interpret fair employment legislation as declaring maternity-related disabilities to be like other temporary disabilities and as prohibiting employers from treating them differently. The Division and the EEOC interpret their respective fair employment statutes as doing just that.

To read *Aiello* as requiring reversal of the decision below would impose upon persons claiming to be aggrieved by disparities in fringe benefits for maternity-related and other disabilities an unduly heavy burden of proof. Instead of looking to the effect of such disparities, leaving to employers the burden of justifying them on the basis of business necessity, complainants would have to show invidious

discrimination based upon the employer's intent to discriminate. The aggrieved person would bear as heavy a burden of proof as someone challenging the constitutionality of a statute. The Division respectfully submits that such a reading of *Aiello* misconceives the appropriate standard for proving discrimination and conflicts head-on with *Griggs* v. *Duke Power Co., supra* and with *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973).

POINT II

Griggs v. *Duke Power Co.* furnishes the appropriate test for reviewing the decision below.

Petitioner does not challenge the constitutionality of Title VII, but raises only the question how the statute should be applied (Brief for Petitioner p. 2). Under *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), the appropriate test in this context is the effect of the employment practice upon the persons Title VII was enacted to protect. If petitioner's practice "operates to exclude" women, *Id.* at 431, then, unless it can be shown to be related to job performance or justified by business necessity, the practice is discriminatory as to sex.

The Division respectfully submits that this case is the counterpart, under the statutory prohibition against discrimination as to sex, of *Griggs* and its application of the statutory prohibition against discrimination as to race and color. The factual distinctions between this case and *Griggs* do not warrant a different reading or application of the statute.

Like the pre-employment requirements in *Griggs* (test scores and a high school diploma), petitioner's wage maintenance plan is neutral on its face. The pre-employment requirements in *Griggs* did not exclude blacks as such but only those persons, white as well as black, who did not measure up. Similarly, petitioner's wage maintenance plan does not disfavor female employees as such, but only those employees (necessarily female) who are disabled by pregnancy and childbirth. Like the pre-employment requirements, which operated to exclude blacks from employment, petitioner's wage maintenance plan operates to exclude women from fringe benefits, which are part of the fruits of employment.

In two respects this is a clearer case of discrimination even than *Griggs*. The exclusionary impact there affected blacks disproportionately but not uniquely: white applicants, too, were excluded. Here, the exclusionary impact is unique to women, and widespread among them, because so many female employees are of childbearing age. Furthermore, there is an even more obvious connection between sex and pregnancy than there is between race and test scores.

Petitioner concedes that exclusion from an employer's income maintenance plan of certain nonoccupational disabilities unique to blacks (sickle-cell anemia) or to Jews (Tay-Sachs) would be discriminatory (Brief for Petitioner pp. 15-16 n. 26). The exclusionary impact would not fall on all black or Jewish employees but only on those who suffer from the disabiltiy. On this analysis, exclusion of a disability unique to men (hemophelia) would be discriminatory. It follows necessarily that exclusion of a disability unique to women is discriminatory.

Petitioner has not shown how the exclusion of pregnancy-related disabilities from its wage maintenance plan is connected with job performance or justified by business necessity. Petitioner's argument as to cost does not discharge the burden of explanation. Indeed, petitioner has conceded that there is "no reliable basis to estimate the cost of providing pregnancy-related disability benefits due to, *inter alia*, the enormous difficulty of accurately assessing the bona fide period of real disability" (Appendix p. 194).

Accordingly, it was reasonable for the courts below to apply the guidelines of the EEOC equating with sex discrimination an employer's differentiation between employees on the basis of pregnancy, and ruling out cost as a defense to a charge of discrimination in fringe benefits.

This Court has ruled the guidelines of the EEOC to be entitled to "great deference" on review and, insofar as supported by the language and history of Title VII, to acceptance as expressing the will of Congress. *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 434. The EEOC's guidelines as to pregnancy were not published until March 30, 1972, 37 Fed. Reg. 6835, effective April 5, 1972. Their publication followed by a few days enactment of the Equal Employment Opportunity Act of 1972, Act of March 24, 1972, 86 Stat. 103, by which Congress amended Title VII. The guidelines are therefore not mentioned in the legislative history of the amendment. That history, however, expresses strong concern over the prevalence of sex discrimination in employment. H.R. Rep. No. 92-238, 92nd Cong. 1st Sess. (1971) as set out in 2 U.S. Code Cong. & Adm. News 2137, 2140, 2141 (1972); see Note, "*Geduldig* v. *Aiello*:

Pregnancy Classifications and the Definition of Sex Discrimination," 75 *Colum. L. Rev.* 441, 464 (1975). Nothing in the history of the 1972 amendments to Title VII expresses intent to exclude or exempt employment practices relating to pregnancy.

Congress relies upon factual analysis by the EEOC of discriminatory policies and practices on the part of employers. Such analysis is furnished in the agency's annual reports. These reports have included findings by the EEOC that differentiation by an employer between employees who are pregnant and those who are not is sex discrimination. See, *e.g.*, EEOC 5th Annual Report (year ending June 30, 1970) p. 14; 6th Annual Report (year ending June 30, 1971) pp. 11-12. Enactment of the Equal Employment Opportunity Act of 1972 was based, in part, on the work of the EEOC on problems of sex discrimination. There is no indication Congress disagreed with the EEOC's equation of an employer's differentiation as to pregnancy with discrimination as to sex.

Petitioner relies on *Espinoza* v. *Farah Manufacturing Company,* 414 U.S. 86, 94-5 (1973) to question the EEOC's guidelines as to pregnancy. *Espinoza* holds only that deference will not be given an administrative interpretation where there are "compelling indications that it is wrong." There is no such indication here. On the contrary: there are indications that the guidelines properly interpret the will of Congress. Even if legislative intent is unclear, an agency's interpretation is entitled to deference if it promotes the objectives of the statute. See *Unemployment Comm.* v. *Aragon,* 329 U.S. 143, 153 (1946); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965).

The predominance of decisions under fair employment legislation is in accord with the guidelines of the EEOC as to pregnancy, and requires employers to provide with respect to maternity-related disabilities the same benefits provided with respect to other disabilities. *Gilbert* v. *General Electric Company, supra; Farkas* v. *South Western City School Dist.,* 8 CCH E.P.D. ¶9619 (S.D. Ohio 1974), *affirmed,* 506 F.2d 1400 (6th Cir. 1974); *Dessenberg* v. *American Metal Forming Co.,* 8 CCH E.P.D. ¶9575 (N.D. Ohio 1973); *Lillo* v. *Plymouth Local Bd. of Educ.,* 8 CCH E.P.D. ¶9510 (N.D. Ohio 1973); *Vick* v. *Texas Employment Comm'n, supra; Vineyard* v. *Hollister Elementary School District, supra; Sale* v. *Waverly-Shell Rock Board of Education, supra; Union Sch. Dist.* v. *Human Appeal Bd., supra; Cedar Rapids Community School District* v. *Parr, supra; Goodyear Tire & Rubber Co.* v. *Rubber Workers, Local 200,* 8 CCH E.P.D. ¶9657 (Ohio Ct. App. 1974). *Contra*: *Ray-O-Vac* v. *Wisconsin Dept. of Industry, Labor and Human Relations,* 8 CCH E.P.D. ¶9656 (Wis. Cir. Ct. 1974).

Petitioner relies on one Federal case, *Newmon* v. *Delta Airlines, Inc.,* 475 F.2d 768 (5th Cir. 1973), *remanded and final order entered,* 374 F. Supp. 238 (N.D. Ga. 1973), which can be read as disallowing sick leave benefits for maternity-related disabilities. However, it is not clear from the court's opinion that the plaintiff limited her claim to the period of actual disability. She may have claimed benefits for the entire term of pregnancy without regard to disability. The court, relying on and construing the EEOC's guideline, found in it no equation of disability with pregnancy as such.

The EEOC's guideline as to cost is also reasonable in the context of this case. The courts have ruled that avoidance of expense of changing employment practices is not a business purpose that will validate differential effects of unlawful employment practices. *Robinson* v. *Lorillard Corporation,* 444 F.2d 791, 799 n.8, 800 (4th Cir. 1971); *Potlatch Forests, Inc.* v. *Hays,* 318 F. Supp. 1368, 1375 (E.D. Ark. 1970), *affirmed,* 465 F.2d 1081 (8th Cir. 1972). In deciding *Weinberger* v. *Wiesenfeld,* —— U.S. ——, 95 S. Ct. ——, 43 L. Ed.2d 514 (1975), this Court did not hesitate to require equal benefits for survivors of male and female workers under the Social Security Act, despite the high cost to the Government of increasing benefits. N.Y. Times, March 20, 1975 p. 1 col. 2-4. The Division's experience with fringe benefits suggests that most employers' plans permit adjustment to reflect limitations on available resources. The Division respectfully submits that fair employment legislation is less concerned with the size of the pie than with nondiscriminatory distribution of the slices.

Conclusion

This case offers the Court an opportunity to reaffirm and reapply one of its most respected and frequently cited decisions. By specifically holding that the *Griggs* case is the measure of sex discrimination no less than of race discrimination, this Court will reinforce efforts of the legislative and executive branches of the Federal government to provide equal employment opportunity. Such a holding will assist a reasonable interpretation of state fair employment legislation.

The decision of the Court of Appeals should be affirmed.

Dated: New York, New York
August 29, 1975

Respectfully submitted,

HENRY SPITZ, *General Counsel*
State Division of Human Rights
270 Broadway
New York, New York 10007
Attorney for Amicus Curiae
(212) 488-5377

ANN THACHER ANDERSON
PAUL HABTMAN
Of Counsel

MOTION FILED
JUL 30 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A corporation,
Petitioner,

versus

SANDRA WETZEL, and MARI ROSS, on behalf of themselves and all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF AND BRIEF OF ALASKA AIRLINES, INC., ALOHA AIRLINES, INC., ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INCORPORATED, CONTINENTAL AIR LINES, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., HAWAIIAN AIRLINES, INC., HUGHES AIR CORP., d/b/a HUGHES AIRWEST, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, INC., OZARK AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AIRLINES, INC., SOUTHERN AIRWAYS, INC., TEXAS INTERNATIONAL AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., WESTERN AIRLINES, INC., WIEN ALASKA AIRLINES, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Gordon Dean Booth, Jr.
1400 Candler Building
Atlanta, Georgia 30303
Attorney for
Amici Curiae on Behalf of
Petitioner, Liberty Mutual
Insurance Company

Of Counsel:
J. Stanley Hawkins
William H. Boice
Troutman, Sanders,
Lockerman & Ashmore
1400 Candler Building
Atlanta, Georgia 30303

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53098, N. O. LA. 70153 · 504/822-1611

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-1245

Liberty Mutual Insurance Company,
A corporation,
Petitioner,

versus

SANDRA WETZEL, and MARI ROSS, on behalf of themselves and all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Third Circuit

---

MOTION OF AND BRIEF OF ALASKA AIRLINES, INC., ALOHA AIRLINES, INC., ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INCORPORATED, CONTINENTAL AIR LINES, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., HAWAIIAN AIRLINES, INC., HUGHES AIR CORP., d/b/a HUGHES AIRWEST, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, INC., OZARK AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AIRLINES, INC., SOUTHERN AIRWAYS, INC., TEXAS INTERNATIONAL AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., WESTERN AIRLINES, INC., WIEN ALASKA AIRLINES, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

COME NOW ALASKA AIRLINES, INC., ALOHA AIRLINES, INC., ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INCORPORATED, CONTINENTAL AIR LINES, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., HAWAIIAN AIRLINES, INC., HUGHES AIR CORP., d/b/a HUGHES AIRWEST, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, INC., OZARK AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AIRLINES, INC., SOUTHERN AIRWAYS, INC., TEXAS INTERNATIONAL AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., WESTERN AIRLINES, INC., WIEN ALASKA AIRLINES, INC., hereinafter referred to as "*Amici* Airlines," and pursuant to Rule 42(3) of this Court, hereby respectfully move for leave to file the attached brief *amici curiae* on behalf of Petitioner, Liberty Mutual Insurance Company. Written consent to the filing of such brief has been requested of both parties and granted.

APPLICANTS' INTEREST

1. Applicants are major domestic and international U.S. airlines employing over 100,000 women in the airline industry throughout their route systems. Their employment benefit plans and costs of doing business will be dramatically affected if there is an adverse result in this case.

2. Various amici airlines have been parties defendant in litigation in lower federal courts throughout the country in cases which have raised new and important questions concerning the merits of the exclusion of pregnancy coverage from employer benefit

plans; see, for example, *Newmon v. Delta Air Lines*, 375 F. Supp. (N.D. Ga. 1973), involving inter alia, the issue presently before this court.

3. Because these airlines employ large numbers of women of child bearing age, the decision in this case could have a major impact on the future economic health of these companies, a number of which have already suffered net losses of millions of dollars in recent years. It is in the public interest that they be allowed to present their views to this Court.

QUESTIONS OF FACT AND LAW WHICH HAVE NOT BEEN AND PROBABLY WILL NOT BE ADEQUATELY PRESENTED BY THE PARTIES

Amici Airlines believe that the following questions of fact and law have not been, and there is reason to believe they will not be, adequately presented in the briefs of the parties:

1. Whether the issue is at present properly framed so as to reflect the real question before this Court, to-wit: whether under the fringe benefit plan under scrutiny, men receive an unfair advantage in compensation over women or whether fringe benefits as a whole are fairly equivalent between the sexes.

2. Whether in light of Congressional intent, as expressed in related legislation, concerning sex discrimination, such as the proposed Equal Rights Amendment, the lower court properly construed Title VII of the Civil Rights Act of 1964.

3. Whether the EEOC guidelines of April 5, 1972 concerning employment policies relating to pregnancy and childbirth are entitled to any deference since they are the product of naked administrative fiat.

4. Whether, in light of the fringe benefits analysis advanced here, the lower court properly interpreted this court's holding in *Geduldig v. Aiello*, 417 U.S. 484 (1974).

The questions of law and fact which *Amici* Airlines desire to brief are extremely relevant to the issues in this case, especially the problem created by the fact that a majority of women who go on maternity leave fail to return to work once the baby is born.

For the foregoing reasons, it is respectfully requested that this Court grant *Amici* Airlines leave to file a brief as *amici curiae*.

Gordon Dean Booth, Jr.
1400 Candler Building
Atlanta, Georgia 30303

OF COUNSEL:

J. Stanley Hawkins
William H. Boice
Troutman, Sanders,
Lockerman & Ashmore
1400 Candler Building
Atlanta, Georgia 30303

TABLE OF CONTENTS

Page

MOTION OF ALASKA AIRLINES, INC., ALOHA AIRLINES, INC., ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INCORPORATED, CONTINENTAL AIR LINES, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., HAWAIIAN AIRLINES, INC., HUGHES AIR CORP., d/b/a HUGHES AIRWEST, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, INC., OZARK AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AIRLINES, INC., SOUTHERN AIRWAYS, INC., TEXAS INTERNATIONAL AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., WESTERN AIRLINES, INC., WIEN ALASKA AIRLINES, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE i

APPLICANT'S INTEREST ii

BRIEF OF ALASKA AIRLINES, INC., ALOHA AIRLINES, INC., ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INCORPORATED, CONTINENTAL AIR LINES, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., HAWAIIAN AIRLINES, INC., HUGHES AIR CORP., d/b/a HUGHES AIRWEST, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, INC., OZARK AIRLINES, INC.,

TABLE OF CONTENTS (Continued)

Page

PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AIRLINES, INC., SOUTHERN AIRWAYS, INC., TEXAS INTERNATIONAL AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., WESTERN AIRLINES, INC., WIEN ALASKA AIRLINES, INC., AS AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT

I. TITLE VII DOES NOT REQUIRE A DISABILITY INSURANCE PROGRAM TO PROVIDE COVERAGE FOR PREGNANCY OR ANY OTHER CONDITION 3

A. Title VII Requires Equality In a Fringe Benefit Program As a Whole and Does Not Require the Inclusion of Any Particular Benefits 3

B. The Inclusion of Pregnancy In a Disability Insurance Program Would Force the Restructuring or Abolition of Fringe Benefit Programs to Maintain the Equality That Presently exists 8

II. THE LEGISLATIVE HISTORY OF TITLE VII AND THE PROPOSED EQUAL RIGHTS AMENDMENT TO THE CONSTITUTION SUPPORT

TABLE OF CONTENTS (Continued)

Page

THE VIEW THAT THE FAILURE TO INCLUDE PREGNANCY BENEFITS HERE IS NOT UNLAWFUL 12

III. THE SEX DISCRIMINATION GUIDELINES ISSUED BY THE EEOC ON APRIL 5, 1972 CONCERNING EMPLOYMENT POLICIES RELATING TO PREGNANCY AND CHILDBIRTH ARE NOT ENTITLED TO ANY DEFERENCE IN THE DECISION OF THIS CASE BECAUSE THEY ARE THE PRODUCT OF NAKED ADMINISTRATIVE FIAT 14

IV. THE ISSUE IN THIS CASE HAS ALREADY BEEN DETERMINED BY THIS COURT IN *GEDULDIG V. AIELLO* 21

A. In *Geduldig* this Court Held that the Exclusion of Pregnancy Related Disabilities Does Not Constitute Discrimination on the Basis of Sex 23

B. The Phrase "Discrimination on the Basis of Sex" Does Not Mean Something Different Under Title VII Than It Does Under the Fourteenth Amendment 24

CONCLUSION 28

CERTIFICATE OF SERVICE 29

APPENDIX A A-1

TABLE OF CITATIONS

Cases: Page

Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973) 13

Geduldig v. Aiello, 417 U.S. 484 (1974) iv,3,21,22,23,24,25,26,27

Gilbert v. General Electric Co., 375 F.Supp. (E.D. Va. 1974), Affirmed 4th Circuit Court of Appeals, Case No. 74-1557 (June 27, 1975) 7,27

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 7,21

McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973) 25

National Labor Relations Board v. Boeing Co., 412 U.S. 67 (1973) 16

Newmon v. Delta Air Lines, 375 F. Supp. 238 (N.D. Ga. 1973) iii,17

Williams v. New Orleans S.S. Assoc., 341 F. Supp. 613 (E.D. La. 1972) 16

Constitution, Statutes, Regulations, Miscellaneous:

United States Constitution

Fifth Amendment 23

Fourteenth Amendment 22,23

Equal Rights Amendment (proposed) iii,2

TABLE OF CITATIONS (Continued)

Page

Statutes

Administrative Procedure Act, 5 U.S.C. 553 ... 18,19

Civil Rights Act of 1964, Title VII, 78 Stat. 253 as amended by the Equal Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. 2000e., et. seq. ..... *passim*

Equal Pay Act, 29 U.S.C. 206(d) 23

Regulations

29 C.F.R. 1601.30 16

30 Fed. Reg. 14926 15

33 Fed. Reg. 3344 15

34 Fed. Reg. 13367 15

37 Fed. Reg. 6835 15,18,19

Miscellaneous:

110 Cong. Rec. 2577 (1964) 12

110 Cong. Rec. 2581 (1964) 12

110 Cong. Rec. 13663 (1964) 12

S. Rep. No. 92-689, 92nd Cong., 1st Sess. 11 (1971) 14

Hearings on S.J. Res. 61 and S.J. Res. 231 before the Committee on the Judiciary, U.S. Senate, 91st Cong., 2nd Sess. 430 (1970) 14

TABLE OF CITATIONS (Continued)

Page

Hearings on H.J. Res. 35,208 and Related Bills, and H.R. 916 and Related Bills before Subcomittee No. 4 of the Committee on the Judiciary, House of Representatives, 92nd Cong., 1st Sess. 40 (1971) 14

CCH Employment Practices Guide ¶ 17,-304.43 16

Note, "Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964", 1968 Duke L.J. 671 12

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-1245

Liberty Mutual Insurance Company,
A corporation,
Petitioner,

versus

SANDRA WETZEL, and MARI ROSS, on behalf of themselves and all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Third Circuit

---

SUMMARY OF ARGUMENT

Title VII requires equality in the compensation which an employer provides employees of both sexes. Total compensation is composed of wages and fringe benefits. Equality of wages is not an issue in this case. The test for determining whether equality exists in fringe benefits is whether the payments made by the employer to provide fringe benefits are *fairly equivalent* for employees of each sex. In the absence of a showing of pretextual motivation, the particular benefits provided are irrelevant to the issue of sex discrimination within the meaning of Title VII. Since equal benefits are provided for both sexes and since it

costs an employer more to provide these benefits for women, the fringe benefit programs involved in this case are hardly discriminatory against women.

Since the legislative history of Title VII's prohibition against discrimination based on sex is extremely sparce, it is necessary to examine more recent expressions of Congressional intent in the area of women's rights. In the 1970 and 1971 Congressional debates surrounding the proposed Equal Rights Amendment, it was understood that reasonable classifications based on characteristics unique to one sex would remain proper if the Amendment were ratified. Congressional proponents of the Equal Rights Amendment continually explained that laws *concerning physical characteristics unique to one sex*, such as *child-bearing*, would not be laws which discriminated on the basis of sex. It is difficult to imagine that by the last minute inclusion of sex discrimination among the prohibitions of Title VII, Congress intended to enact the sweeping change suggested here.

Much reliance has been placed, by the lower courts in this case and others, on the April 5, 1972, EEOC Guidelines concerning employment policies relating to pregnancy and child birth and "great deference" has been paid to those guidelines in earlier proceedings in this case. As is clear from the circumstances under which those guidelines were issued, they are *in fact* entitled to *no* deference whatsoever because they were issued after *no* studies or investigations, without any procedural protections or public hearings, and are the product of naked administrative fiat.

Since the proper test in a Title VII case involving fringe benefits is whether the benefits to the two sex groups are *fairly equivalent* based on the per capita costs of the plan, this Court's holding in *Geduldig v. Aiello*, 417 U.S. 484 (1974) is dispositive of the issues in this case. In *Geduldig* the California disability plan was supported by contributions from workers of both sexes. In this case, the funds spent on premiums for the disability plan are funds allocable to the cost of labor the same as are wages. The substantial increase in cost which would follow the inclusion of pregnancy would be borne by *all* workers, both male and female, in a reduction of the employee benefit dollars available. Added benefits flowing from these added costs could flow only in favor of a small group of workers who, by definition, must be women. On the other hand, the actuarial benefits derived from the exclusion of pregnancy coverage, flow to all employees. This important factor is the same one which lead this Court to hold that such a practice was not sex-based and therefore could not constitute invidious sex discrimination.

ARGUMENT

I. Title VII Does Not Require A Disability Insurance Program To Provide Coverage For Pregnancy Or Any Other Condition.

A. *Title VII Requires Equality In a Fringe Benefit Program As a Whole and Does Not Require the Inclusion of Any Particular Benefits.*

The Amici Airlines respectfully submit that the analysis of the issue in this case has focused on only

one element of a comprehensive method of compensation — wages and fringe benefits. The true issue is whether an employer's fringe benefit program taken as a whole discriminates on the basis of sex. One aspect of a fringe benefit program may be disability insurance, and pregnancy is simply one potentially compensable condition in such a program. It is impossible to determine whether the inclusion or exclusion of any particular condition in a disability program is discriminatory without examining the *entire* program.

Fringe benefits are nothing more than a form of compensation which an employer provides for employees. *Amici* submit that the correct rule, which this Court should adopt can be stated as follows:

> **So long as the payments made by an employer to provide fringe benefits are *fairly equivalent* for employees of each sex, the particular benefits provided are irrelevant to the issue of sex discrimination within the meaning of Title VII unless the exclusion or inclusion of a particular benefit is a "mere pretext" for discrimination.**

This rule is thoroughly consistent with the statute, with the congressional history in the area (including the ERA), with Fourteenth Amendment standards, and furthermore keeps the courts out of the quagmire of picking and choosing among every possible benefit which does not fall evenly on all employees. As the

record in this case shows, almost all benefits when reduced to the smallest unit are enjoyed more by one sub-group of employees than by another.

No fringe benefits are provided for male employees in this case which are not also provided for female employees. Likewise, no fringe benefits are provided for female employees which are not also provided for male employees. The simple fact of the matter is that it costs an employer substantially more on a per capita basis to provide these benefits for women than for men. Since this is a part of the total employee compensation package, women currently receive greater compensation when the benefits covered are equal under a fringe benefit plan. To require an employer to increase the disparity in compensation under the rubric of equality is nonsense. The purpose of Title VII is not to favor one class of employees over another but to require equality of treatment.

By focusing on the narrow issue of pregnancy benefits, the Court below has missed the importance of the meaning of equality in the entire area of fringe benefits. The Court of Appeals for the Third Circuit held that an employer must provide disability insurance benefits for its employees who become pregnant if the employer provides disability insurance benefits for illness or other disabilities. With appealing simplicity, the court held that since only women can become pregnant, the failure to provide disability benefits for pregnancy constitutes discrimination on the basis of sex.

It is neither the purpose of Title VII, *nor is it necessary to this Court's interpretation of the Act*, to shape the parameters of an employer's disability insurance program item by item. Some conditions will occur only in women, some only in men; some will be more prevalent in women, some more prevalent in men; and some will occur equally in both sexes. The law requires equality of treatment of employees and forbids favoring any class of employees on the basis of the impermissible classifications of race, color, religion, sex or national origin. Equality on the basis of sex under Title VII requires that an employer compensate men and women performing the same or similar jobs equally. Equality in direct compensation (wages) must not be destroyed by inequality in indirect compensation (fringe benefits).

Regardless of the structure of the particular plan, an employer disability program is built upon insurance concepts. An employer purchases or provides an insurance policy which has specified benefits for a certain cost. If new benefits are included in the plan, the cost necessarily increases. As more funds are directed into a disability program, less funds are available for wages. In essence, it is the employees who pay at least partially for any increase in benefits under a disability plan. Those employees (male and female) who do not plan, or are unable, to have children have no need for the inclusion of pregnancy benefits in their disability package. Those who do not desire these unique benefits should not be required to pay (directly or indirectly) higher premiums to subsidize the increased costs of including benefits they neither want nor need in a program *which already costs more for one sex than the other.*

If the payments made by the employer to provide benefits for male and female employees are *fairly equivalent*, then the fringe benefit program does not discriminate on the basis of sex within the meaning of Title VII. If wages are also nondiscriminatory, then the employer is compensating male and female employees equally. There is no need for further judicial scrutiny if these conditions are met.

The test proposed above is similar to that taken by the EEOC and the Courts in evaluating employment tests under Title VII. An employer is not required to establish the validity of an employment test *until* it is shown that the test has a disparate impact on a particular class of employees. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Likewise, an employer should not be required to justify the inclusion or exclusion of any particular condition until it is shown that his disability insurance program provides disparate compensation for one class over another. In the absence of a showing of pretextual motivation (of which there has been none in this case), judicial scrutiny of a fringe benefit program should end when it has been determined that the payments made by the employer to provide the insurance are fairly equivalent for each class of employee. When this standard is applied to disability insurance programs, it is clear that these programs do not discriminate against women. The simple fact is that it now costs more for an employer to provide the type of insurance involved in this case for women than it does for men, even *without* any additional benefits for pregnancy.[1]

1 For example, actuary Paul Jackson, a Fellow in the Society of Actuaries, who has worked in the area of disability insurance coverage since 1956 testified without contradiction in *Gilbert v. General Electric Co.*, 375 F. Supp. (E.D. Va. 1974) concerning the insurance industry practice and experience with respect to disability insurance. His testimony showed that approximately 40

It is unclear from the record what portion of the benefit dollar provided by Liberty Mutual to its employees is received by females. This determination may have to be made on remand in light of the standard proposed above.

B. The Inclusion of Pregnancy In a Disability Insurance Program Would Force the Restructuring or Abolition of Fringe Benefit Programs to Maintain the Equality That Presently Exists.

The inclusion of pregnancy benefits in a disability insurance program is not a minor adjustment. It is a major expense in the aggregate which is not normally included in a disability policy. The annual cost of adding maternity benefits to the sickness and accident disability income plans currently in effect in the United States has been estimated at over one billion dollars.

Employers and employees have an obvious interest in maintaining the financial integrity of their disabili-

---

percent of the work in the United States under age 65, or some 32,000,000 employees, is covered by sickness and accident disability insurance. The benefit periods of this insurance vary: about 45 percent of the plans provide 13 weeks benefit coverage; 50 percent provide coverage for 26 weeks; and only 5 percent provide coverage for 52 weeks. Only 40 percent of these plans, covering about 12,800,000 employees, provide a pregnancy benefit, and such coverage is almost always limited to six weeks. The cost per unit of benefit under the existing insurance plans for a female employee is approximately 170 percent of that for a male employee even where no maternity benefit is provided; where a six-weeks maternity benefit is provided, the female cost per unit of benefit runs to 210 percent of the male employee cost; and the latter percentage goes up to 300-330 percent of the male employee cost per unit of benefit where full maternity coverage is provided.

ty insurance programs. The purpose of these plans is income protection during a temporary period of disability at an affordable cost. Unlike other conditions, pregnancy often represents a permanent change in status from employee to non-employee. Between forty and fifty percent of the female employees who have children do not return to work following the birth of their child. For these employees, pregnancy does not represent an interruption in their employment but rather a change from a full-time employee to a full-time parent. To provide pregnancy benefits to employees who desire to leave their employment to raise a family would amount to a massive form of severance pay. Such a result is patently unfair to the remaining employees who are seeking income protection for temporary disabilities. It is self evident that there is no reliable way to determine which employees would return following childbirth and which would not. The point is not that some persons would abuse the program. The point is that the cost of these programs would be substantially increased to provide benefits which will accrue to a large number of non-employees. It simply is not possible for pregnancy benefits to be provided without drastically increasing the cost and affecting the purpose of existing disability insurance programs.

Because females normally receive a larger share of the benefit dollar even in disability plans which do not include pregnancy, the inclusion of pregnancy as a compensable condition would *increase the disparity in compensation between men and women*. Since Title VII proscribes sex discrimination and not merely sex

discrimination against women, it is doubtful that it will be long before male employees begin challenging such benefit programs on the ground that they result in discriminatory higher compensation of women than men. Employers will then be faced with the dilemma of having to reduce some other benefits to women or increasing the benefits paid to men.

The employer may opt to avoid the entire problem by simply abandoning its disability insurance program and increasing the wages accordingly so that employees could purchase their own disability insurance. *Title VII only requires equality. It does not require an employer to provide any fringe benefits at all — including disability insurance.* This option vividly displays the fallacy in the argument that an employer's disability insurance program must include maternity benefits:

> ***If* it is not discriminatory for an employer to have *equal wages* and no insurance program (allowing employees of either sex to purchase their own coverage), *then* it must not be discriminatory for an employer to have *equal compensation* consisting of equal wages and equal fringe benefits.**

Otherwise, an employer who provided no insurance program would have to increase the wages of female employees so that they could purchase pregnancy disability insurance. Title VII was never intended to require the anomalous result of higher wages for women than for men.

There simply is no need for this court to examine the particular benefits which employers and employees have decided to purchase as part of a fringe benefit program. Once this Court determines that the total compensation, including wages and fringe benefits, is equal for male and female employees, the requirements of Title VII have been met. The *Amici* Airlines respectfully submit that the only *workable test* for determining whether equality in fringe benefits exists, which can be clearly understood and administered fairly and easily by both employers and the courts, is a test which focuses on the payments made by the employer to purchase the benefits involved. If the payments made by an employer to provide fringe benefits are fairly equivalent for both sexes, equality exists and the requirements of Title VII have been met.

II. The Legislative History Of Title VII And The Proposed Equal Rights Amendment To The Constitution Support The View That The Failure To Include Pregnancy Benefits Here Is Not Unlawful.

As is known to this Court, the legislative history of Title VII's prohibition against discrimination based on sex is extremely sparse. The House debate on the sex discrimination amendment covers only nine pages in the Congressional Record.[2] The problem presented in this case was not anticipated during that brief debate, although one of its proponents, Congresswoman St. George, did state that women do not seek or need "special privileges" of the type sought here.[3] Senator Humphrey, manager of the pending Senate bill, commented at one point that, "differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill if it becomes law."[4] Certainly, these remarks strongly suggest that Congress wisely recognized that the inherent differences between men and women would justify certain distinctions which employers could make with regard to benefit plans. What Congress in effect said was that Title VII's sex discrimination provisions did not reach those particular situations where men and women were not similarly situated.

---

2 110 Cong. Rec. 2577-2584 (1964). *See generally*, Note, "Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964," 1968 Duke L.J. 671.

3 110 Cong. Rec. 2581 (1964).

4 110 Cong. Rec. 13663-4 (1964).

There are some, including the EEOC, who feel that these earlier expressions of congressional intent are outmoded in light of changes in societal attitudes toward women. However, these proponents of the expansion of rights and privileges for women ignore a much more recent and explicit expression of the Congressional mind.[5] In 1970 and 1971, Congress considered the proposed Equal Rights Amendment to the Constitution ("ERA"). During the hearings and debates on the ERA, which, if adopted will overlap Title VII in many respects, much was said about the concept of sex discrimination in a situation where members of the two sexes were not *similarly situated*. For example, fourteen members of the House Committee on the Judiciary who supported the version of the ERA which was ultimately approved by both Houses of Congress stated as their Separate Views:

> ". . . the original resolution does not require that women must be treated in all respects the same as men. 'Equality' does not mean 'same.' As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example, a law providing for payment of the medical costs of child-bearing could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual

---

5 The practice of looking to analagous legislative activity to glean the general legislative understanding of any given provision was sanctioned by this Court in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973).

factor which should be determinative." H.R. Rep. No. 92-359, 92d Cong., 1st Sess. 7 (1971).

This understanding was adopted by the majority Report of the Senate Committee on the Judiciary,[6] by the authors of the ERA[7] and by various constitutional scholars and commentators.[8] Proponents of the ERA continually explained that laws concerning wet-nurses, sperm banks, *child-bearing*, forcible rape and other matters related to physical characteristics unique to one sex are not laws which discriminate on the basis of sex. Thus, a classification dealing with pregnancy in a separate manner, consistent with the general concepts set forth above, is not a scheme within the Congressional mind which discriminates on the basis of sex.

III. The Sex Discrimination Guidelines Issued By The EEOC On April 5, 1972 Concerning Employment Policies Relating To Pregnancy And Childbirth Are Not Entitled To Any Deference In The Decision Of This Case Because They Are The Product Of Naked Administrative Fiat.

The Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.*, went into effect on July 2, 1965. Guidelines on

6 S. Rep. No. 92-689, 92nd Cong., 1st Sess. 11 (1971).

7 Hearings on H.J. Res. 35,208 and Related Bills, and H.R. 916 and Related Bills, before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 92nd Cong. 1st Sess. 40 (1971).

8 *E.g.*, T. Emerson, Hearings on S.J. Res. 61, S.J. Res. 231 before Committee on Judiciary, U.S. Senate, 91st Cong., 2nd Sess. 430, n. 7 (1970).

Discrimination Because of Sex were originally issued by the EEOC on November 24, 1965;[9] they were amended first on February 21, 1968;[10] again on August 19, 1969;[11] and were last amended and revised effective April 5, 1972.[12] Prior to the last revision, the Guidelines expressed no view whatsoever with respect to the way disabilities resulting from pregnancy or childbirth were to be treated. However, in a series of opinion letters issued contemporaneously with the passage of Title VII and adherred to consistently up to 1972, the EEOC repeatedly stated its position that it was not necessary that pregnancy be included. For example, in an opinion letter issued in 1966, General Counsel Charles Duncan succinctly explained the EEOC's position on the issue:

> ". . . The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. . . . We do not believe an employer must provide the same fringe benefits for pregnancy as he provides for illness . . ."

On the specific question before this Court as to whether pregnancy need be covered under disability insurance benefit plans, Mr. Duncan set out the

9 30 Fed. Reg. 14926.

10 33 Fed. Reg. 3344.

11 34 Fed. Reg. 13367.

12 37 Fed. Reg. 6835.

EEOC's position in another opinion letter "issued pursuant to 29 C.F.R. 1601.30":

> ". . . An insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory." (Excerpt from an EEOC opinion Factor dated November 10, 1966.)[13]

General Counsel Opinion Letters are considered to be interpretations of Title VII by the Commission. *Williams v. New Orleans S.S. Association*, 341 F. Supp. 613, 615-616 (E.D. La. 1972). Absent more, and since the opinion letters are reasonably contemporaneous with the Act, and consistent with each other, they are entitled to "great deference" by the courts. *National Labor Relations Board v. Boeing Company*, 412 U.S. 67, 75 (1973).

Notwithstanding its prior interpretations of the Act with regard to the pregnancy benefits question, the EEOC suddenly reversed itself and issued revised guidelines on April 5, 1972. These are the guidelines which respondents here assert are entitled to "great deference." As will be shown, these guidelines are not entitled to any deference. These radically different "guidelines," which obviously will have a major economic impact on the business sector, were developed in a factual vacuum with no respect for necessary procedural safeguards and with absolutely no investigation whatsoever.

---

13 Certain of the Opinion Letters issued in 1966 regarding the instant question were published in the CCH Reporting Service. *E.g.*, CCH EPG ¶ 17,304.43.

The Chief of the Legislative Council Division of the EEOC at the time these guidelines were published was Mrs. Sonia P. Fuentes, who had held that position for several years before the guidelines were issued. (See testimony of Mrs. Fuentes, attached hereto as Appendix A, pages A-1 through A-8, *infra.)* The Office of Legislative Council was responsible for drafting rules, regulations and guidelines in the area of sex discrimination and other related matters. Thus, this office was responsible for preparing the 1972 guidelines. (Page A-3)

In an early case, following the issuance of the new Guidelines, *Newmon v. Delta Air Lines, Inc.*, 374 F. Supp. 238 (N.D. Ga. 1973), where the precise issue before this court was considered, Mrs. Fuentes (as the author of the "Guidelines") was subpoenaed and testified by deposition concerning the issuance of the guidelines by the Commission. In considering what effect those guidelines were to have on the case before him, Judge Henderson concluded that they were not worthy of judicial deference because "there appears to be no factual basis upon which these regulations were drawn."[14] An examination of that testimony will show that Judge Henderson's statement was well founded.

Among other things, the testimony was that the EEOC knew of *no* medical studies concerning pregnancy which had been conducted by the EEOC prior to the issuance of the guidelines.[15] The testimony also indicated that the Commission was *not aware of any* financial studies concerning the impact of the

---

14 374 F. Supp. at 245.

15 Appendix at A-3—A-8.

guidelines on industry as a whole which had been made either by it or anyone else at the time the guidelines were drafted.[16] And, in spite of the fact that the EEOC was totally *unaware* of *any relevant data* collected by it or others, the Commission held no public hearings in connection with the development of the guidelines which might have elicited helpful information. Instead of being developed under the protection of any sort of procedural due process consistent within the concepts guaranteed by the Constitution, the 1972 guidelines were composed by one person who had no expertise in the field of medicine, economics or labor relations, and who was assisted by only four other people, including two law students employed as law clerks. Thus were the guidelines for American Industry in the area of maternity leave programs developed.

The mere fact of the existence of such an administrative determination, supposedly entitled to "great deference" necessarily leads one to an examination of how the 1972 guidelines came into existence. In its prefatory remarks to the guidelines published on April 5, 1972, the Commission stated:

> "Because the material herein is interpretive in nature, the provisions of the Adminstrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rule-making, opportunity for public participation, and delay in the effective date are inapplicable." (37 Fed. Reg. 6835, 6836) (April 5, 1972)

---

16 Appendix at A-5—A-6.

Having dispensed with the procedural safeguards which Congress clearly intended federal agencies to use when it enacted the Administrative Procedure Act, the EEOC then proceeded to have the guidelines published in the April 5, 1972 edition of the Federal Register within the pages entitled "Rules and Regulations," in a shocking attempt to *clothe these writings with the dignity which this Court had given to earlier guidelines on job testing.*

Where did the agency get the authority to issue guidelines in such a manner? The EEOC states it was by virtue of Section 713(b) of Title VII of the Civil Rights Act of 1964, U.S.C. Section 2000e-12(b). *See* 37 Fed. Reg. 6835. Section 2000e-12 sets forth as follows:

Regulations: Conformity of Regulations

With Administrative Procedure Act: Reliance on Interpretations and Instructions of Commission

(a) The Commission shall have authority from time to time to issue, . . . suitable *procedural* regulations to carry out the provisions of the subchapter. Regulations issued under this section *shall be in conformity with the standards and limitations of the Administrative Procedures Act.*

(b) In any action or proceeding based on any alleged lawful employment practice, no person shall be subject to any liability or

> punishment for, or on account of, (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with and in reliance on a*ny written interpretation or opinion* of the Commission . . . [Emphasis added.]

Section 2000e-12(a) authorizes the Commission to issue procedural regulations in conformance with the APA. Since the 1972 Guidelines are clearly substantive in nature, the EEOC has no authority to make such regulations under Section 2000e-12(a).

The EEOC looks to (b) where although it has no authority to make regulations there, it finds implicit power to issue "written interpretations and opinions," which do not have the same procedural limitations attached. It is difficult to believe that Congress intended procedural regulations of the EEOC to be promulgated in a Constitutional manner, and yet not afford the same protection to *substantive* written interpretations, which obviously have a far greater impact on our society. Although it is difficult to understand why the EEOC appears eager to avoid compliance with the APA, it must, nevertheless, adopt the latter interpretation in order to avoid compliance and it has done so.

It is submitted that Congress never intended that the EEOC would promulgate substantive rules under the "written interpretation" clause of Section 2000e-12(b) and that the Commission has greatly overstepped its

authority by doing so. There is certainly a great deal of difference between guidelines interpreting a portion of the statute which requires that testing be job-related, as in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and a naked declaration that a previously approved practice is *prima facie* unlawful. In *Griggs* this Court said that the guidelines there under consideration were entitled to great deference because "the Act and its legislative history support the Commission's interpretations," a remark which the opinion carefully documented.

It is submitted that the interpretive history of Title VII supports the conclusion that the failure to include pregnancy among covered disabilities in employment disability insurance coverage does not constitute "discrimination on the basis of sex" within the meaning of Title VII. The 1972 EEOC guideline to the contrary possesses none of the *indicia* of validity, was issued after no study or hearing, is otherwise wrong, and deserves no deference whatsoever. Rather, the contemporaneous position taken by the EEOC itself prior to 1972 is a proper interpretation of the meaning of sex discrimination under Title VII as related to individualized treatment of pregnancy.

IV. The Issue In This Case Has Already Been Determined By This Court In *Geduldig v. Aiello.*

The Third Circuit Court of Appeals found that this Court's opinion in *Geduldig v. Aiello*, 417 U.S. 484 (1974), is not controlling authority with regard to the issues in this case. Both cases involve the per-

missibility of the failure to include coverage for disability from pregnancy in a sickness and accident disability plan. Although the plans were essentially the same, in *Geduldig* the manager of the plan was the State of California whereas here it is a private employer. The Court of Appeals stated it this way:

> "*Geduldig v. Aiello* involved the question of whether there was sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Here we are involved with the question of whether there was discrimination in violation of Title VII of the Civil Rights Act of 1964. In this posture our case is one of statutory interpretation rather than one of constitutional analysis. On this distinction alone we believe appellant's reliance on Aiello is misplaced."

The Court of Appeals obviously felt that while situations could exist in which a state might lawfully carry on a discriminatory practice, it did not follow that a private employer could lawfully carry on the same discriminatory practice. This analysis is correct as far as it goes. *Amici* Airlines do not contest that there may be different tests under the Equal Protection Clause and Title VII to determine whether a *discriminatory* practice is lawful. *However, each test must start with a practice which discriminates on the basis of sex and* Geduldig *holds that the non-inclusion of pregnancy from the covered disabilities in an accident and sickness disability plan is not discrimination based on sex.*

If *Geduldig* had held that the practice there under scrutiny was sexually discriminatory but was justified because of some compelling governmental purpose then that case would not necessarily have any precedential value here. But such was simply not the case.

A. *In* Geduldig *this Court Held that the Exclusion of Pregnancy Related Disabilities Does Not Constitute Discrimination on the Basis of Sex.*

Though the laws governing sex discrimination in this country are different in certain major respects,[17]

---

17 Charges of sex discrimination may be examined under several laws of the United States. As in *Geduldig*, the permissibility of discrimination on the basis of sex by the states is governed by the Equal Protection Clause of the 14th Amendment, while the permissibility of such discrimination on the part of the federal government is controlled by the 5th Amendment. Similarly, the extent to which private employers may discriminate on the basis of sex in hiring, compensation or wages is governed by Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. Using these various laws as weapons, women are attacking stereotyped barriers of entry into what was heretofore a male-dominated employment market.

Some forms of discrimination on the basis of sex are legally permissable, however, and under each of the laws mentioned above, certain defenses are available to a party charged with sex discrimination. Thus, a state may show that it is not in violation of the Equal Protection Clause of the 14th Amendment when it establishes a discriminatory classification based on sex by showing that the classification had a "rational basis" or that its resulting discrimination is justified by a "compelling state interest." These same defenses are available to the federal government under the 5th Amendment. Likewise, under Title VII of the 1964 Civil Rights Act, an employer may justify discrimination on the basis of sex if it is the result of a bona fide occupational qualification or is required by overriding business necessity. An employer may also discriminate in pay between employees of different sexes provided that the system under which the pay differentials are calculated is one which measures earnings by quantity or quality of production.

under each there is a two-step analysis. The threshold question for each is the same — whether the act or practice complained of constitutes discrimination on the basis of sex. If the answer to the threshold question is in the affirmative, then the party accused may interpose a defense of justification, the type and extent of justification required being governed by the particular law under which the action is brought. If, and only if, this Court is convinced that the non-inclusion of disability resulting from pregnancy in an employee sickness and accident disability program constitutes discrimination on the basis of sex, does it then become necessary to consider whether such sex discrimination is of the unlawful variety.

B. *The Phrase "Discrimination on the Basis of Sex" Does Not Mean Something Different Under Title VII Than It Does Under the Fourteenth Amendment.*

Geduldig was decided under the Equal Protection Clause. The present action is brought under Title VII. In order to prevail here, respondents must convince this Court that the English words "discrimination on the basis of sex" mean something different when the Fourteenth Amendment is involved than they do when Title VII comes into play. They must also convince this Court that a plan which costs the same per capita for employees of both sexes, and from which women already derive greater benefits, is discriminatory *against* women. In this regard, the cases which hold that Title VII "standards" are different than Equal Protection "standards" are inapposite.

It is not here asserted that once an event of sex discrimination is found that this Court must apply the same standards for determining its permissibility under both laws. It *is* asserted *that a determination by this Court that a practice does not constitute "discrimination on the basis of sex,"* as a statement of logic, requires the application of the same logical equation to the *same practice* when the statutory proscription is against discrimination on the basis of sex. Such an equation was set forth in *Geduldig* footnote 20 to the majority opinion:

> "While it is true that only women can become pregnant, it does not follow that every legislative classification is a sex-based classification like those considered in *Reed, supra* and *Frontiero, supra* . . .
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups — pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The physical and actuarial benefits of the program thus accrue to members of both sexes."

Therefore, unless it can be shown that the exclusion of pregnancy from covered disabilities is "pretextual," *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which showing has not here been made, the plan is lawful.

As was set forth in the initial section of this brief, a fringe benefit plan is not discriminatory in favor of one sex if the *benefits* to the two sex groups are "fairly equivalent" based on the per capita costs of the plan. Thus a decision to include or exclude a particular benefit or extend or extract coverage of disabilities by an employer does not require judicial scrutiny unless one sex derives an unfair benefit over the other.

In *Geduldig* this Court found it important that the substantial increase in cost which would accompany inclusion of normal pregnancy among the covered disabilities in the California plan would have to be borne by the non-pregnant citizens of California — both male and female. *Aiello, supra* at 265. This important factor is equally present when the plan is operated by a private employer. To assume that it would be the employer alone and not the employee-beneficiaries of the plan who would bear the staggering costs of pregnancy inclusion, omits entirely the give and take of the bargaining process and is in fact nothing more than economic *naiveté*.

Any business has a finite amount of money available for distribution to all of those with an interest in the revenue of the business. Suppliers, lenders, owners and employees all share in those funds. Premiums paid by the employer on sickness and accident policies are attributable to the employee share of revenue along with salaries, wages and other fringe benefits.

Additional funds expended on higher premiums, which would accompany the inclusion of pregnancy

benefits are funds which employees, male and female, might otherwise have received in the form of higher wages or other benefits through the process of labor contract negotiations. Those higher wages and benefits must, under Title VII, inure to employees of both sexes.

Thus, inclusion of pregnancy benefits would have a secondary effect of requiring *non-pregnant employees to bear the burden* by placing substantial funds beyond their bargaining reach. The choice of whether this should be done is most properly left up to the bargaining units as the people involved and should be subjected to judicial scrutiny, under Title VII, *only* if it appears that one sex receives an unfair advantage over the other. Judge Widener put it another way in his dissent in *Gilbert v. General Electric Co.*, 4th Cir. Ct. of App., Case No. 74-1557 (June 27, 1975):

> "And since . . . the exclusion is 'merely' the removal of 'one physical condition — pregnancy — from the list of compensable disabilities,' no reason appears why a collective bargaining agreement may not lawfully do by contract what a state may do by legislation."

In sum, the distinctions which Respondents attempt to draw between *Geduldig* and this case are *distinctions without differences*. Under the Fourteenth Amendment citizens are guaranteed equal protection under state laws. Under Title VII citizens are guaranteed equal opportunity from their employers. It is submitted that *Geduldig* was not written in a vacuum,

but with an eye to Title VII cases to come. It is consistent with the purpose of the 1964 Act — to equalize opportunity, not to create an advantage for either men or women.

CONCLUSION

For the foregoing reasons it is urged that this Court should reverse the decision of the Third Circuit Court of Appeals.

Respectfully submitted.

GORDON DEAN BOOTH, JR.
1400 Candler Building
Atlanta, Georgia 30303

Attorney for Amici

Of Counsel:

WILLIAM H. BOICE
J. STANLEY HAWKINS
Troutman, Sanders,
Lockerman & Ashmore
1400 Candler Building
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing has been served on Petitioner and Respondents by depositing same in the United States mail, postage prepaid, properly addressed this ____ day of July, 1975.

GORDON DEAN BOOTH, JR.

APPENDIX A

Proceedings
Taken at the Offices of the
Equal Employment Opportunity Commission
Washington, D.C. 20506

Testimony of Sonia Pressman Fuentes (Called as a witness by Delta Air Lines in the Matter of *Newmon v. Delta Air Lines*, Civil No. 15681, Northern District of Georgia, on May 31, 1973, to give a deposition concerning the drafting and promulgation of the "EEOC Guidelines on Discrimination Because of Sex", issued April 5, 1972.)

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Whereupon

SONIA PRESSMAN FUENTES

was called for examination by counsel for the defendant, and having been first duly sworn, was examined and testified as follows:

Direct Examination
By Mr. Murphy:

Q. Please state your name for the record. A. My name is Sonia Pressman Fuentes.

* * * *

Q. By whom are you presently employed? A. By the Equal Employment Opportunity Commission.

* * * *

Q. What was your job with the Equal Employment Opportunity Commission? That is, commencing in 1965? A. I was a member of the General Counsel's Office.

* * * *

[12] Q. Approximately when did you become Chief of the Legislative Counsel Division? A. I gave you my best recollection. It was during the time Stanley Hebert was counsel, several years ago. I am sorry. I am not that good on time. Maybe two or three years ago.

Q. Did you continue in that position as Chief, Legislative Counsel up until this day, or have your responsibilties changed in the interim? A. No. I think commencing the first February of this year, that Division was abolished and I became an attorney in the trial litigation section.

Q. Now, do you recall meeting with me here at your office on or about May 4, 1973? A. I don't remember the date, but I did meet you.

Q. And at that time can you recall me asking you several questions concerning the development of the Equal Employment Opportunity Commission

Guidelines which [14] are contained in Section 1604.10, I guess it is of the Commission's Regulations and Guidelines . . . In fact, is this a copy of the Guidelines on Discrimination Because of Sex of the Equal Employment Opportunity Commission? A. It appears to be. It is. I don't know whether it is complete or not. They are published in the Code of Federal Regulations. I don't know whether this is complete. These are certainly some of the documents.

Q. I refer you specifically to the last page on the document and I refer you to specifically Section 1604.10 and I ask you if those are the . . . Guidelines with regard to Pregnancy and Childbirth which we discussed during my visit on May 4, 1973? A. Well, they are the Guidelines on Pregnancy and Childbirth. They are so entitled.

Q. At the time of my discussion with you in early May, can you recall me asking you if you participated in the development of these Guidelines with other attorneys [15] here of the Equal Employment Opportunity Commission? A. I recall that I said I was one of many Commission personnel who had participated in the formulation of the Guidelines.

Q. Can you recall me asking you at that time whether you knew of any medical studies which had been made in conjunction with the development of those Guidelines? A. As I recall, *I think you asked me whether the EEOC had conducted any medical studies and I think I recall saying to my knowledge it had not.* I think I also recall stating that there had been medical testimony, considerable medical testimony

presented in Court cases which involved allegations of discrimination in connection with Employer policies in the pregnancy area and I cited such court cases to you. I am trying to think of the name of it now. There was one case where there was considerable medical testimony pointing out that a woman can safely work when she is pregnant, and so on. *To my knowledge, EEOC had not itself made such studies.*

[17] Q. Can you recall me asking you at our conversation in early May whether or not the EEOC to your knowledge had conducted any studies with regard to the financial impact of the pregnancy and maternity leave guidelines? A. Well, [18] if there was such a study, since it was not made public, whether or not it was made would be a matter available to the general public; therefore I could not testify about it.

[19] Q. To refresh your memory, can you recall us discussing in early May a study about the financial impact of the Commission's Guidelines which had been made by a Bank [20] in the Boston area? A. I am trying to think. I think I have seen some write up but I don't recollect where, in a publication put out by Prentice-Hall. Prentice-Hall put out a study on leave policies in connection with maternity leave policies. *It might have contained some information on the cost.* There might also have been some information on that in a speech Jacqueline Gutwillig gave. She gave a speech in this area which has just been published. That might have contained some facts on cost. *I am just not sure.*

[21] Q. Are you aware of any studies which any one might have made with regard to the job performance of pregnant women which based upon studies of work output in relation to other women in the work force? A. *The only information I have seen, or testimony or position, are in court cases.* As I recall, the testimony indicated that by and large pregnant women could perform as well as anyone else except in jobs requiring standing where the woman involved had difficulty with swelling of the feet or ankles.

[22] Q. Do you recall or do you know of any studies which have been made by anyone with regard to the psychiatric disorders which occur in pregnancy, including phobias, depression, psychoses, and emotional instability of pregnant women as it affect their job performance? A. This is the first time in my life that I have heard there are such things associated with pregnancy . . .

Q. Can you recall having seen any studies having to do with the percentage of the female population with enters labor prematurely? A. No.

Q. Do you recall or are you aware of any studies which have concerned the phenomenon of a histal hernia occurring in pregnant women? A. That is the first time I have heard that is related to pregnancy, if it is.

Q. Have you ever seen or are you aware of any studies concerning urological problems of pregnancy as related to working women and the impact of frequent urination on job performance? A. I have seen no such study.

Q. Have you seen or are you aware of any studies with regard to the physical phenomenon of pregnancy, phenomena of pregnancy as they are related to job performance? A. That is a difficult question. With regard to studies, *I don't think so.*

Q. Are you aware of any hearings which were held, public hearings which were held in connection with the development of the Equal Employment Opportunity Commission's Guidelines on Employment Policies relating to pregnancy and childbirth? A. *No.*

[24] Q. Now, is it not true that the Equal Employment Opportunity Commission's position with regard to pregnancy and childbirth has changed since the effective date of the Civil Rights Act of 1964, which was July 2, 1965. A. Prior to the publication of these Guidelines on April 5, 1972, the Commission had no Guidelines on the matter of pregnancy and childbirth. There had been several Commission decisions in that area and the General Counsel's office had written some letters on that subject, but there had been no commission's position expressed in Guideline form until April 5, 1972.

[28] Q. Basically, do you recall my calling you up and telling you that I had a number of clients who were interested in the Commission's guidelines on discrimination because of sex, and that you said that there was another [29] woman, or man, I can't remember, another person who was primarily responsible in that area; at the present time, due to a change in positions, that you had with the Commission

several months before. A. I recall, I don't recall you saying that you had a number of clients who were interested. I got the impression from our conversation, of course it was a month ago, that you said you had some clients that were interested. There was a question in this area, that you wanted to come up with them, that somebody had given you my name. I can't recall exactly what I said. I think I would have said, *in the past my jurisdiction included the formulation of guidelines on behalf of the Commission*, but that was no longer within my jurisdiction and I believe I referred you to Issie Jenkins, a woman who was in charge of the office of legal counsel, who had that area within her jurisdiction. I think I might have mentioned she was out on leave in connection with the forthcoming birth of a child, and a man named John Goins was acting in her place . . .

* * * *

[46] Cross-Examination
By Mrs. Rindskopf:

Q. Do you know of any published studies indicating the incidence of premature birth in pregnant women? A. Do I know of any? What do you mean, "Do I know of any?" Do you mean, have I heard there have been any?

Q. Have you read or been informed of the results of any? A. To the best of my recollection, I have not read any such studies.

Q. I think I am correct if I stated that you were not aware of the problem of hiatal hernia in pregnancy? A. That is correct.

* * * *

Q. While you were functioning as Chief of the Office of Legislative Counsel . . . You enumerated a number of areas for which you had responsibility. One of the areas you stated was the drafting of rules, regulations and guidelines. Now, the guidelines to which you refer are those that are published from time to time in the Code of Federal Regulations, is that correct? A. They were published in the Federal Register. I think some of them find their way into the Code of Regulations.

Q. Will you describe the rules to which you referred: How do they differ from the guidelines? A. *I don't know that they do* . . .

Q. Was the first Guidelines, Sex Discrimination as it related to Pregnancy Leaves, issued on April 5, 1972? A. That is correct.

Q. Prior to that time there have been no Guidelines on that subject? A. No guideline rule or regulation, that is correct, although there have been Commission Guidelines on Sex Discrimination and on other subjects, published since 1965 or 1966 . . .

[59] Q. Has anything ever been published in the Federal Register that has not had the prior approval of both the General Counsel and the Commission? A. I don't know.

TROUTMAN, SANDERS, LOCKERMAN & ASHMORE
Attorneys at Law
Candler Building
Atlanta, Georgia 30303
404 522-7480
Cable: Maestro

July 23, 1975

Howard A. Specter, Esq.
Litman, Litman, Harris & Specter, P.A.
1320 Grant Building
Pittsburgh, Pennsylvania 15219

Re: Sandra Wetzel and Mari Ross vs.
Liberty Mutual Insurance Company

Dear Mr. Specter:

As I informed you by telephone today, we have been requested to file an Amicus Curiae brief in the above-referenced case on behalf of the following parties:

Alaska Airlines, Inc.
Aloha Airlines, Inc.
Allegheny Airlines, Inc.
American Airlines, Inc.
Braniff Airways, Incorporated
Eastern Air Lines, Inc.
Flying Tiger Lines, Inc.
Frontier Airlines, Inc.
Hawaiian Airlines, Inc.
Hughes Airwest
National Airlines, Inc.

North Central Airlines, Inc.
Northwest Airlines, Inc.
Ozark Airlines, Inc.
Pan American World Airways, Inc.
Piedmont Airlines, Inc.
Southern Airways, Inc.
Texas International Airlines, Inc.
Trans World Airlines, Inc.
United Air Lines, Inc.
Western Airlines, Inc.
Wien Alaska Airlines, Inc.

It is my understanding that you will consent to our filing of this brief provided that you receive a copy of same by July 31, 1975.

In accordance with the Supreme Court Rules, we need your written consent to file this brief on behalf of the above-listed parties as soon as possible. We will provide you with a copy of this brief prior to the July 31st.

Thank you very much for your cooperation in this matter.

Very truly yours,
/s/ WILLIAM H. BOICE
William H. Boice

WHB:mu

Consented to by:
/s/ HOWARD A. SPECTER
Howard A. Specter
Attorney for Respondents
July 24, 1975

LEDERER, FOX AND GROVE
Attorneys at Law
Sears Tower • Suite 7916
233 South Wacker Drive
Chicago, Illinois 60606
Area Code 312
Telephone 876-0500

July 22, 1975

Dean Booth, Esq.
Troutman, Sanders, Lockerman & Ashmore
Candler Building
Atlanta, Georgia 30303

Re: *Liberty Mutual Insurance Company v. Wetzel and Ross, et al*

Dear Mr. Booth:

Liberty Mutual Insurance Company consents to the filing of a brief amicus curiae in the above captioned matter on behalf of the members of the Air Transport Association, as follows:

Alaska Airlines, Inc.
Aloha Airlines, Inc.
Allegheny Airlines, Inc.
American Airlines, Inc.
Braniff Airways, Incorporated
Continental Air Lines, Inc.
Delta Airlines, Inc.
Eastern Airlines, Inc.

Flying Tiger Lines, Inc.
Frontier Airlines, Inc.
Hawaiian Airlines, Inc.
Hughes Airwest
National Airlines, Inc.
North Central Airlines, Inc.
Northwest Airlines, Inc.
Ozark Airlines, Inc.
Pan American World Airways, Inc.
Piedmont Airlines, Inc.
Southern Airways, Inc.
Texas International Airlines, Inc.
Trans World Airlines, Inc.
United Airlines, Inc.
Western Airlines, Inc.
Wien Alaska Airlines, Inc.

Very truly yours,
/s/ KALVIN M. GROVE
Kalvin M. Grove
for Lederer, Fox
and Grove

ek

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

(4380)

IN THE

Supreme Court of the United States

October Term, 1974

Supreme Court, U. S.
FILED
JUL 31 1975
MICHAEL RODAK, JR., CLERK

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A Corporation,

Petitioner,

v.

SANDRA WETZEL and MARI ROSS, on Behalf of Themselves and All Others Similarly Situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR GENERAL MOTORS CORPORATION AS *AMICUS CURIAE*

SIMON H. RIFKIND
MARTIN KLEINBARD
345 Park Avenue
New York, New York 10022

Attorneys for General Motors Corporation

Of Counsel:

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

FRAZER F. HILDER
EDMOND J. DILWORTH, JR.
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202

TABLE OF CONTENTS

PAGE

Interest of General Motors Corporation 1

Argument

I. The exclusion of pregnancy from a private employer's disability benefits program does not constitute discrimination against its women employees 3

A. Under Title VII as under the Equal Protection Clause, exclusion of pregnancy from disability benefits coverage is a classification based on risk, and not discrimination based on sex 4

B. Pregnancy benefits are excluded or limited in private employers' disability insurance programs because of cost factors and actuarial considerations, and not as a pretext for invidious discrimination against women 7

C. Normal pregnancy differs so markedly from disabilities resulting from sickness and accident that its exclusion from benefits coverage is justified and permissible 10

Conclusion 13

TABLE OF AUTHORITIES

Cases: PAGE

Frontiero v. Richardson, 411 U.S. 677 (1973) 4

Geduldig v. Aiello, 417 U.S. 484 (1974) 3, 4, 7, 9
Gilbert v. General Electric Co., —— F.2d ——, 10 F.E.P. CAS. 1201 (4th Cir. June 27, 1975), *petition for cert. filed*, 43 U.S.L.W. 3675 (U.S. June 17, 1975) (No. 74-1590), *aff'g* 375 F.Supp. 367 (E.D. Va. 1974) 5, 8
Grogg v. General Motors Corp., 73 Civ. 63 (K.T.D.) (S.D.N.Y., filed Jan. 4, 1973) 2

Reed v. Reed, 404 U.S. 71 (1971) 4

Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199 (3d Cir. 1975), *aff'g* 372 F.Supp. 1146 (W.D. Pa. 1974) 11

Constitution, Statutes and Rules:

U.S. Constitution, Fourteenth Amendment (Equal Protection Clause) 4, 5

Civil Rights Act of 1964, Title VII, 78 Stat. 253, as amended by the Equal Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e *et seq.* (1974) 2, 3

Supreme Court Rule 42 1

Articles and Books:

Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871 (1971) 7

PAGE

Eastman and Russell, Expectant Motherhood (5th ed. rev. 1970) 10

Grubb & McCoy, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 Harv. Civil Rights—Civil Liberties L. Rev. 260 (1972) 12

Hillman, *Sex and Employment Under the Equal Rights Amendment*, 67 Nw. U.L. Rev. 789 (1973) 6

Weidenbaum, Government-Mandated Price Increases: A Neglected Aspect of Inflation (American Enterprise Institute for Public Policy Research 1975) 10

Miscellaneous:

Equal Rights Amendment, H.J. Res. 208 and S.J. Res. 9 (1972) 6

H.R. Rep. No. 92-359, 92nd Cong., 1st Sess. 7 (1971) 6–7

Geduldig v. Aiello, 417 U.S. 484 (1974):
Brief for Appellant 12
Brief for General Electric Company as Amicus Curiae 8, 9, 11, 12
Brief of the American Telephone and Telegraph Company as Amicus Curiae 9, 12, 13

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A Corporation,

Petitioner,

v.

SANDRA WETZEL and MARI ROSS, on Behalf of Themselves and All Others Similarly Situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR GENERAL MOTORS CORPORATION AS *AMICUS CURIAE*

General Motors Corporation files this brief *amicus curiae* pursuant to the written consents of the parties hereto, which are on file with the Court as required by Supreme Court Rule 42.

Interest of General Motors Corporation

General Motors Corporation ("GM"), a company engaged in the manufacture of automobiles and other products, employs about 550,000 people, over 79,000 of them women.

Since 1928, GM has provided partial income replacement benefits for its employees who are unable to work because of sickness or accident, or who are disabled because of pregnancy or resulting childbirth or complications. From the outset, the disability benefits program was effected through an insurance policy with Metropolitan Life Insurance Company, for which GM pays the premium. Under the present insurance program, negotiated through the years by collective bargaining with the unions representing GM employees, income replacement benefits for temporary disability due to sickness or accident are normally paid for up to 52 weeks, while benefits for pregnancy-related disabilities are paid for up to 6 weeks. Under other provisions of GM's comprehensive employee benefit plan, all of its employees and their eligible dependents are provided with insurance coverage for hospitalization expenses and doctors' fees, including obstetrical delivery and pre-natal and post-natal care.

GM is the defendant in a civil suit presently pending in the United States District Court for the Southern District of New York, *Grogg* v. *General Motors Corp.*, 73 Civ. 63 (K.T.D.), in which the central issue presented is similar to one raised in this appeal: The *Grogg* plaintiffs allege in substance that GM, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* (1974), discriminates against its female employees because of their sex by limiting income replacement benefits for pregnancy-related disabilities to 6 weeks. The case has not yet reached trial.

To the best of our knowledge, because of the prohibitive cost involved, the overwhelming majority of employers in

the United States who provide sickness and accident disability benefits to their employees either furnish no income replacement benefits for pregnancy-related disabilities, or limit such benefits to a period of not more than 6 weeks. If the Court were to hold in this case that Title VII requires such employers to include normal pregnancy among the sickness- and accident-related disabilities for which insurance coverage up to the maximum period is provided, the financial impact of the decision would be substantial to GM, and have an even greater impact on the thousands of smaller employers faced with similar liability.

ARGUMENT

I

The exclusion of pregnancy from a private employer's disability benefits insurance program does not constitute discrimination against its women employees.

We limit our argument to the proposition that the exclusion of normal pregnancy from disability insurance coverage—or, as in GM's case, limitation of pregnancy disability benefits to a maximum period of 6 weeks—does not discriminate against women as such, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* (1974). Such a program "does not exclude anyone from benefit eligibility because of gender, but merely removes one physical condition—pregnancy—from the list of compensable disabilities." *Geduldig* v. *Aiello*, 417 U.S. 484, 496 n.20 (1974).

A. Under Title VII as under the Equal Protection Clause, exclusion of pregnancy from disability benefits coverage is a classification based on risk, and not discrimination based on sex.

It was the rationale of the *Aiello* case that exclusion of normal pregnancy from disability benefits coverage involves a classification based on risk, not one based on gender alone. That rationale, formulated with reference to a state disability insurance plan for employees of private employers, is precisely applicable in this case to a private employer's disability benefits program. Here, as in *Aiello*:

> "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.
>
> • • •
>
> "The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes." 417 U.S. at 496-97 and n.20.

As a threshold matter, therefore, the pregnancy exclusion is not a sex classification at all. It does not involve discrimination "based on gender as such," but only makes a permissible non-sexual distinction between "pregnant women" and "nonpregnant persons," *id.* at 497 n.20. We do not have here any "dissimilar treatment for men and women who are • • • similarly situated," the definition of sex discrimination formulated by the Court in *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

The *Aiello* rationale comes from a case construing the Equal Protection Clause, but it is just as pertinent in a Title VII context. As Judge Widener wrote, dissenting, in *Gilbert* v. *General Electric Co.*, —— F.2d ——, 10 F.E.P. CAS. 1201, 1206 (4th Cir. June 27, 1975), *petition for cert. filed*, 43 U.S.L.W. 3675 (U.S. June 17, 1975) (No. 74-1590), a case like this one:

> "Absent a showing of sex discrimination, Title VII, even if its reach were broader than the equal protection clause, would not render unlawful a pregnancy exclusion such as that involved here. Since the Supreme Court has held, for precisely the same exclusion, there is a 'lack of identity between the excluded disability and gender as such,' the exclusion should no more support a finding of discrimination under Title VII than under the equal protection clause. And since, as the Court says, the exclusion is 'merely' the removal of 'one physical condition—pregnancy—from the list of compensable disabilities,' no reason appears why a collective bargaining agreement may not lawfully do by contract what a state may do by legislation."

The court below, however, did not accept *Aiello* as dispositive, and viewed the case as one of statutory interpretation of Title VII. Title VII contains no definition of "sex discrimination," and the court recognized the meagerness of the legislative history regarding the addition of the word "sex" to the forms of discrimination proscribed by the Act. In holding that the pregnancy exclusion was a form of sex discrimination, the court below chose, therefore, to rely on EEOC sex discrimination guidelines formulated in 1972, *after* an amendment of the Act in which Congress made no substantive changes with respect to sex discrimination.

The petitioner's brief and those of other supporting *amici* set out at length the reasons why this Court should accord no special deference to the EEOC guidelines on pregnancy benefits. We need not repeat those arguments here. We wish to note, however, that the court below ignored a substantial amount of legislative history on the Equal Rights Amendment ("ERA")—the fullest exposition we have of Congressional intent respecting sex discrimination and its relation, if any, to classifications based on single-sex characteristics—which lends strong support to the *Reed* and *Frontiero* definitions of sex discrimination and the distinction drawn by the Court in *Aiello.*

In hearings and debate concerning the ERA, its adherents said over and over again that the amendment would not interfere with state or federal power to legislate with respect to physical characteristics unique to one sex. See generally Hillman, *Sex and Employment Under the Equal Rights Amendment,* 67 Nw. U.L. Rev. 789 (1973). Fourteen members of the House Judiciary Committee who supported the original version of H.J. Res. 208, the version of the ERA ultimately approved by both houses of Congress, stated as their separate views on H.J. Res. 208:

> "The legal principle underlying the Equal Rights amendment as proposed by Mrs. Griffiths is that the law must deal with the individual attributes of the particular person and not with stereotypes or over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. 'Equality' does not mean 'sameness.' As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example, a law providing for payment of the medical costs of child bearing could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative." H.R. Rep. No. 92-359, 92nd Cong., 1st Sess. 7 (1971).

In a law review article which became part of the legislative history of the ERA, Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 Yale L.J. 871, 893 n. 166 (1971), there is the following exposition of classifications based on unique sex traits:

> "[The E.R.A.] does not preclude legislation (or other official action) which regulates, takes into account, or otherwise deals with a physical characteristic unique to one sex. In this situation, it might be said, in a certain sense, the individual obtains a benefit or is subject to a restriction because he or she belongs to one or the other sex. Thus a law relating to wet nurses would cover only women, and a law regulating the donation of sperm would restrict only men. Legislation of this kind does not * * * deny equal rights to the other sex."

B. Pregnancy benefits are excluded or limited in private employers' disability insurance programs because of cost factors and actuarial considerations, and not as a pretext for invidious discrimination against women.

In *Aiello,* the Court was careful to note that distinctions involving pregnancy will be struck down upon a showing that they are "mere pretexts designed to effect an invidious discrimination against the members of one sex or the other," *Geduldig* v. *Aiello,* 417 U.S. 484, 496-97 n.20 (1974).

There was no such showing in this case. Not covert sex stereotyping, but cost factors and actuarial considerations have prompted employers to exclude pregnancy from disability benefits programs, or to impose time limitations on the payment of benefits.

Actuarial studies presented without contradiction at the trial of *Gilbert* v. *General Electric Co.*, —— F.2d ——, 10 F.E.P. CAS. 1201 (4th Cir. June 27, 1975), *petition for cert. filed*, 43 U.S.L.W. 3675 (U.S. June 17, 1975) (No. 74-1590), *aff'g* 375 F.Supp. 367 (E.D. Va. 1974), show that about 40 per cent of the work force in the United States under age 65, or about 32,168,000 employees, are covered by sickness and accident disability insurance. The benefit periods of this insurance vary: about 45 per cent of the plans provide 13 weeks of benefits; 50 per cent provide 26 weeks; and about 5 per cent provide coverage for 52 weeks. Only about 42.6 per cent of these plans, covering about 13,500,000 employees, provide a pregnancy benefit, and the pregnancy benefit is almost always limited to 6 weeks of coverage. Presently, moreover, the cost per unit of benefit under existing insurance for a female employee is approximately 170 per cent of that for a male employee even where no maternity benefit is provided.[1] Where a 6-week maternity benefit is provided, the cost per unit of benefit for female employees runs to 210 per cent of the male employee cost. Where full maternity coverage is provided,

1. General Electric does not provide any pregnancy disability benefits for its women employees. Nevertheless it was GE's experience that in 1970, the average cost per insured employee of total benefits paid under GE's sickness and accident insurance was $82.57 for women and $45.76 for men; in 1971, GE's average cost for women was $112.91 and $62.08 for men. Brief for General Electric Company as Amicus Curiae, at 24 n.16, in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974).

the female cost of benefit goes up to 300-330 per cent of the male employee cost per unit. Brief for General Electric Company as Amicus Curiae, at 23-25, in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974).

It was the testimony of GE's actuarial expert at the *Gilbert* trial that the annual cost of adding maternity benefits to the sickness and accident disability income plans currently in effect in the United States would be $1,353,000,000. Another actuarial study put in evidence in the *Gilbert* case put the additional cost per year for a 20-week maternity benefit at $1,005 million; for a 25-week benefit at $1,313 million; and for a 30-week benefit at $1,620 million. *Id.* at 25 and n.18. In the *Aiello* case itself, 417 U.S. at 494 n.18, California estimated that the increased cost of including normal pregnancy within the risks covered by California's disability insurance system would require a 33 per cent to 36 per cent increase in the amount of benefits paid out.

Statistical data presented to and noted by the Court in *Aiello*, *id.* at 497 n.21, shows that women receive a disproportionate advantage under existing disability plans even where benefits for normal pregnancy are not provided, and that coverage of normal pregnancy would increase costs substantially, again to the disproportionate advantage of female employees. See, *e.g.*, Brief of the American Telephone and Telegraph Company as Amicus Curiae, at 8-11, in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974). In light of this evidence it is difficult to believe that Congress in enacting Title VII intended to require private employers to undertake a multi-million dollar employee benefit program. Furthermore, it is unlikely that employers in the

private sector could or would absorb such additional labor costs: Increases in company-paid disability insurance coverage will show up in higher prices for the company's products or services. See Weidenbaum, Government-Mandated Price Increases: A Neglected Aspect of Inflation 67-69 (American Enterprise Institute for Public Policy Research 1975).

C. Normal pregnancy differs so markedly from disabilities resulting from sickness and accident that its exclusion from benefits coverage is justified and permissible.

The very factors which make normal pregnancy disability an expensive risk to cover are those which justify excluding it from a disability insurance program intended to provide the broadest protection possible, within certain premium limits, against loss of income resulting from unexpected and perhaps calamitous illness or injury.

Pregnancy is neither an illness nor an injury, but a normal, socially desirable, biological function. A widely used handbook for pregnant women, Eastman and Russell, Expectant Motherhood (5th ed. rev. 1970), written by two distinguished obstetricians, begins:

> "Pregnancy should be a healthy, happy time. Childbearing is a natural process, the supreme physical function of womanhood; and no other event confers so much in deep-seated, abiding contentment. As a rule, the greater span of pregnancy is associated with an increased sense of vitality and well-being. Not a few of the discomforts, which only a few decades ago were regarded as invariable accompaniments of pregnancy and labor, have been tracked to their source and

> are now amenable to simple preventive measures; even that old bugbear of childbirth, the pain of labor, has been so assuaged that the majority of American mothers today experience little discomfort. Meanwhile, modern methods of care have so surrounded the whole process with multiple safeguards that the likelihood of a serious complication developing is exceedingly remote."

Pregnancy is, as a general rule, voluntary, usually happily anticipated, and subject to planning. Uncontradicted testimony by medical experts at the *Gilbert* trial established that modern contraceptive methods and the availability of safe medical abortion have virtually eliminated unwanted pregnancy and childbirth. Brief for General Electric Company as Amicus Curiae, at 16-22, in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974).

The court below discounted petitioner's argument about the "voluntariness" of pregnancy, observing:

> "There are a great many activities that people participate in that involve a recognized risk. Most people undertake these activities with full knowledge of the potential harm. Drinking intoxicating beverages, smoking, skiing, handball and tennis are all types of activities in which one could sustain harm." *Wetzel* v. *Liberty Mutual Insurance Co.,* 511 F.2d 199, 206 (3d Cir. 1975).

The analogies drawn by the court are mistaken, however. No one smokes for the purpose of contracting lung cancer, nor goes skiing with the intention of breaking a leg. By contrast, pregnancy is almost always *deliberately* undertaken; it is not, as in the case of sickness and accident, unforeseen and often unforeseeable.

Pregnancy and childbirth can prompt a woman to request a leave which extends beyond the period of inability to work, and which is in significant part determined by the welfare of the child rather than the mother. Medical experts generally agree that the maximum period of disability for pregnancy and childbirth would be from approximately two weeks before delivery to four weeks after. Grubb & McCoy, *Love's Labors Lost: New Conceptions of Maternity Leaves,* 7 Harv. Civil Rights-Civil Liberties L. Rev. 260, 287-88 (1972). Nevertheless, it was California's experience in the *Aiello* case that, when the district court permitted pregnancy disability claims to be filed with the state insurance fund, the claims for disability payments averaged about 15 weeks. Brief for Appellant, at 20, in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974).

Pregnancy and childbirth, unlike illness and injury, often result in a decision to leave the work force. A survey of maternity leaves and absences caused by sickness and accident disabilities conducted by Illinois Bell in 1972 showed that only about 3 per cent of those who had been disabled failed to return to work, while over 48 per cent of employees who took maternity leave did not return following their leave. Brief of the American Telephone and Telegraph Company as Amicus Curiae, at 12-13, in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). It has been General Electric's experience that about 40 per cent of GE's women employees who have babies do not return to work. In 1970, of 3,548 pregnancies among GE female employees, 1,956 women returned to work and 1,592 did not return; and in 1971, there were 2,781 pregnancies, from which 1,634 women returned to work and 1,147 did not. Brief for General Electric Company as Amicus Curiae, at 26-27

n.20, in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). The petitioner in the case before this Court has submitted an affidavit indicating that 80 per cent of its women employees who leave work on account of maternity fail to return to active service. In the case of pregnancy, then, "temporary sickness" benefits intended to tide an employee over a period of necessary unemployment would be, a good part of the time, a unique form of severance pay.

Finally, actuarial statistics show that pregnancy claims have a frequency and duration rate substantially higher than those of any other single disability. Data prepared and presented by The American Telephone and Telegraph Company as *amicus curiae* in the *Aiello* case indicates that coverage of normal pregnancy would generate a significantly greater number of total disability days than any other category of sickness or injury, even combining the data for men and women. AT&T's survey showed that, if disability benefits had been paid for normal pregnancy by the Bell System in fiscal 1971-1972, women would have accounted for 71 per cent of all benefit days though constituting only 48 per cent of total employees eligible for benefits. Brief of the American Telephone and Telegraph Company as Amicus Curiae, at 8-11, in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974).

Conclusion

This Court's decision in the *Aiello* case that the exclusion of normal pregnancy is a classification based on risk, not discrimination based on sex, should be controlling here and dispositive of the issue, requiring reversal of the decision below.

Pregnancy benefits are excluded or limited in private employers' disability insurance programs because of cost and actuarial considerations. The very factors which make normal pregnancy disability an expensive risk to cover—its foreseeability, frequency, and social desirability, its voluntary character, the open-endness of its duration, and the possibility of uncontrollable claim abuse—justify the exclusion of that risk from a disability insurance program intended to provide the broadest protection possible, within reasonable premium limits, against loss of income resulting from unexpected illness or injury.

Respectfully submitted,

SIMON H. RIFKIND
MARTIN KLEINBARD
345 Park Avenue
New York, New York 10022

Attorneys for General Motors Corporation

Of Counsel:

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

FRAZER F. HILDER
EDMOND J. DILWORTH, JR.
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202

Dated: July 31, 1975

Supreme Court, U. S.
FILED
JUL 31 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY, *Petitioner*

v.

SANDRA WETZEL, AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY AS AMICUS CURIAE

CHARLES RYAN
CLARK G. REDICK
AMERICAN TELEPHONE AND TELEGRAPH COMPANY
195 Broadway
New York, New York 10017

THOMPSON POWERS
KENNETH I. JONSON
RONALD S. COOPER
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

Attorneys for the Amicus Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

12293-7-75

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. Statistics Demonstrate That the Operation of a Disability Benefits Plan Which Excludes Normal Pregnancy Does Not Discriminate Against Women	4
A. Women Receive a Disproportionate Advantage Under Existing Disability Plans Even Where Benefits for Normal Pregnancy Are Not Provided	5
B. Pregnancy Is Unique in Its Cost Impact Upon Benefits Programs	6
C. The Low Return Rate Makes Maternity Leaves Unlike Sickness and Accident Disabilities for Job-Related Purposes	8
II. This Court Has Decided That the Exclusion of Normal Pregnancy from Coverage Under a Disability Benefits Plan Does Not Constitute Discrimination on the Basis of Sex	9
A. The Court's Decision in *Aiello* Is Fully Applicable to Employer Disability Benefits Plans Under Title VII	10
B. The EEOC Guideline That Sick Leave Benefits Should Be Provided for Normal Pregnancy Should Be Rejected in This Case	17
C. The Factual Distinctions Relied Upon by the Court Below Do Not Support Its Result	20
CONCLUSION	21

TABLE OF AUTHORITIES

CASES: Page

Albemarle Paper Co. v. *Moody*, No. 74-389 (U.S., June 25, 1975) 15
Castro v. *Beecher*, 459 F.2d 725 (1st Cir. 1972) 12
Chance v. *Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972) 12
Cleveland Board of Education v. *La Fleur*, 414 U.S. 632 (1974) 7, 13
CWA v. *AT&T, Long Lines Dept., petition for cert.* filed 43 U.S.L.W. 3684 (U.S., June 24, 1975) (No. 1601) 2
CWA v. *Illinois Bell Tel. Co.*, No. 73-C-959 (N.D. Ill., filed April 13, 1973) 2
CWA v. *New York Tel. Co.*, C.A. No. 73-3352 (S.D. N.Y., filed July 31, 1973) 2
CWA v. *South Central Bell Tel. Co.*, C.A. No. 73-1771 Section A (E.D. La., filed July 5, 1973) 2
CWA v. *Southern Bell Tel. & Tel.*, No. 18328 (N.D. Ga., filed May 17, 1973) 2
CWA v. *The Pacific Tel. & Tel. Co.*, C.A. No. C-73-1739 RFP (N.D. Cal., filed September 28, 1973) 2
Espinoza v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973) 14, 18, 20
Gaston County v. *United States*, 395 U.S. 285 (1969).. 12
Geduldig v. *Aiello*, 417 U.S. 484 (1974)....3, 4, 9, 10, 11, 12, 13, 14, 16, 17, 20
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 12, 15
Jefferson v. *Hackney*, 406 U.S. 535 (1972) 16, 17
Louisiana v. *United States*, 380 U.S. 145 (1965) 12
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 12, 14, 15, 20
Milliken v. *Bradley*, 418 U.S. 717 (1974) 20, 21
Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163 (1972) 20
Newmon v. *Delta Air Lines, Inc.*, 374 F. Supp. 238 (N.D. Ga. 1973) 19
Papermakers Local 189 v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) . 12
Phillips v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) 15
Reed v. *Reed*, 404 U.S. 71 (1971) 9
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 17
U.S. v. *Chesterfield County School District*, 484 F.2d 70 (4th Cir. 1973) 12
Wetzel v. *Liberty Mutual Insurance Co.*, 511 F.2d 199 (3d Cir. 1975) 12

Page

DECISIONS OF ADMINISTRATIVE AGENCIES:

EEOC Decision No. 68-4-538E, June 16, 1969, CCH EEOC Decisions ¶ 6125 19
EEOC Decision No. 70-360, Dec. 16, 1969, CCH EEOC Decisions ¶ 6084 .....18, 19
EEOC Decision No. 71-308, Sept. 17, 1970, CCH EEOC Decisions ¶ 6170 18
EEOC Decision No. 71-562, Dec. 4, 1970, CCH EEOC Decisions ¶ 6184 18
EEOC Decision No. 71-1474, May 6, 1971, CCH EEOC Decisions ¶ 6221 19

CONSTITUTION AND STATUTES:

Fourteenth Amendment to the Constitution of the United States 3, 4, 9, 10, 12, 13
Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e *et seq.* 2, 3, 4, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20

OTHER AUTHORITIES:

29 C.F.R. § 1604.10(b) 4, 17, 18
38 Federal Register 35336 *et seq.* 4
EEOC First Annual Report to Congress (year ending June 30, 1966) 18
Brief for EEOC as *Amicus Curiae* in *Aiello* v. *Hansen*, 359 F. Supp. 792 (N.D. Cal. 1973), *reversed sub nom. Geduldig* v. *Aiello*, 417 U.S. 484 (1974)....10, 11
Memorandum of John L. Wilks, Director, OFCC, to Agency Heads (Nov. 12, 1970) 4
Opinion of EEOC General Counsel, November 15, 1966 19
Senate Report No. 92-689, p. 12 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY, *Petitioner*

v.

SANDRA WETZEL, AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE[1]

The American Telephone and Telegraph Company, together with the Associated Bell Companies (hereinafter, Bell System Companies), is the largest private employer in the nation, and almost 50 percent of its employees are women. In connection with employ-

---

[1] This brief is filed pursuant to Supreme Court Rule 42(2). Written consent of Petitioner and Respondents has been obtained and filed with the Clerk of the Court.

ment, Bell System Companies maintain disability programs which provide wage continuation benefits for employees disabled to work because of sickness or accident. All these plans, unlike the Petitioner's plan, provide benefits for disability absences resulting from pregnancy complications and abnormal pregnancies, but, like the Petitioner's plan, none provides wage continuation benefits for absences attributable to normal pregnancy and childbirth.[2]

Suits have been brought against six Bell System Companies,[3] alleging that the failure to provide sickness and accident benefits for normal pregnancy violates Title VII. In one of these cases, the Company has a petition for *certiorari* pending before the Court.[4] The resolution of the present case will have a substantial, and quite possibly a dispositive, effect on the cases pending against the Bell System Companies.

---

[2] Each Bell System Company provides periods of uncompensated leave for pregnancy and childbearing whose length is determined on a case-by-case basis. The time of beginning and ending maternity leave is basically determined by the individual employee on the advice of her doctor.

[3] *CWA* v. *AT&T, Long Lines Department, petition for cert.* filed, 43 U.S.L.W. 3684 (U.S. June 24, 1975) (No. 74-1601); *CWA* v. *Illinois Bell Tel. Co.*, No. 73-C-959 (N.D. Ill., filed April 13, 1973); *CWA* v. *Southern Bell Tel. & Tel.*, No. 18328 (N.D. Ga., filed May 17, 1973); *CWA* v. *New York Tel. Co.*, C.A. No. 73-3352 (S.D.N.Y., filed July 31, 1973); *CWA* v. *The Pacific Tel. & Tel. Co.*, C.A. No. C-73-1739 RFP (N.D. Cal., filed Sept. 28, 1973); and *CWA* v. *South Central Bell Tel. Co.*, C.A. No. 73-1771 Section A (E.D. La., filed July 5, 1973).

[4] *CWA* v. *AT&T, Long Lines Dept., supra*, n. 3.

SUMMARY OF ARGUMENT

1. The statistics submitted based on the operation of the Bell System Companies' sickness and accident benefit programs demonstrate that the provision of benefits for normal pregnancy would increase cost dramatically and would augment the disproportionate advantage women presently enjoy in disability plan benefits. Further, the data regarding the rate of return of employees following maternity leave and following disability absence, show that the two conditions are significantly different for employment-related purposes. By covering the same disabilities on the same terms and conditions for all employees, regardless of sex, an employer affords equal risk protection from its disability benefits plan to males and females alike. Title VII should not be construed to require more.

2. The decision below conflicts in principle with this Court's decision in *Geduldig* v. *Aiello*.[5] The Court there held that the Equal Protection Clause of the Fourteenth Amendment did not require California to cover absences due to normal pregnancy under a state-administered disability benefits plan. In reaching this conclusion, the Court explicitly stated that the exclusion of pregnancy did not constitute discrimination on the basis of sex, observing that "[t]here is no risk from which men are protected and women are not."[6] The decision in *Aiello* cannot be dismissed—as the court below would dismiss it—as simply one in which this Court found discrimination based on sex, but held that the discrimination passed constitutional

---

[5] 417 U.S. 484 (1974).

[6] 417 U.S. 484 at 496-497 (1974).

muster because it was justifiable under traditional Fourteenth Amendment standards. The Court went further than that in *Aiello*. It concluded in unmistakable terms that the exclusion of normal pregnancy from a disability benefits plan does not constitute sex-based discrimination—a conclusion which is as valid under Title VII as under the Fourteenth Amendment.

ARGUMENT

I. STATISTICS DEMONSTRATE THAT THE OPERATION OF A DISABILITY BENEFITS PLAN WHICH EXCLUDES NORMAL PREGNANCY DOES NOT DISCRIMINATE AGAINST WOMEN

The Bell System Companies have been concerned with the question before the Court since the promulgation of the revised EEOC Guidelines on Sex Discrimination in 1972.[7] Their concern was sharpened by the filing of the six law suits challenging their sickness and accident disability programs, and by the December, 1973 proposal by the Office of Federal Contract Compliance to revise its Sex Discrimination Guidelines.[8] As a result of these developments, the Bell System Companies undertook to review the operation of these programs and to collect and collate extensive data regarding the present treatment of men and women under such programs; the cost and benefit impact of adding coverage of normal pregnancy; and

[7] 29 C.F.R. § 1604.10(b).

[8] 38 Fed. Reg. 35336-35338. Among the changes under consideration is a provision which would require federal contractors to provide sickness and accident disability benefits for absences from work due to normal pregnancy. This would constitute a reversal of OFCC's present position that, "There is no requirement that an employee be paid during absence [for maternity leave]." Memorandum of John L. Wilks, Director, OFCC, to Agency Heads (Nov. 12, 1970) at 5.

the comparative, employment-related characteristics of maternity leaves and disability absences. The Bell System Companies responded to OFCC's request for public comments on the proposed revisions to its Sex Discrimination Guidelines by submitting a summary of pertinent data regarding the operation of their sickness and accident disability programs. These public comments, which form the basis of the following discussion, are attached as an appendix to this brief.

A. Women Receive a Disproportionate Advantage under Existing Disability Plans Even Where Benefits for Normal Pregnancy Are Not Provided

The distribution of benefits between men and women under the sickness and accident disability plans of the Bell System Companies confirms that, even without considering absences relating to normal pregnancy, women have a greater frequency rate (number of disabilities), and severity rate (duration of disabilities) than men. In fiscal years 1970-1971 and 1971-1972, women had a higher frequency of disabilities and lost more total days from work in sixteen of the seventeen disability group classifications.[9] In 1970-1971, women accounted for 64.65 percent of the total days for which benefits were paid, even though they were only 48.57 percent of the total work force eligible for benefits. Similarly, in 1971-1972, women received compensation for 63.45 percent of the total benefit days though representing only 48.29 percent of employees eligible for benefits.

[9] The one exception in both years is "Diseases of circulatory system" (Group 7), which includes heart attacks and other cardiac problems.

The seventeen disability group classifications, with the exceptions of "Complications of pregnancy, childbirth and puerperium" (Group 11), and "Perinatal morbidity and Mortality" (Group 15), contain comparable conditions, including some conditions which are unique to one sex. Thus, while prostrate trouble may be unique to males, when considered with other "Diseases of the genitourinary system" (Group 10), women have a considerably higher frequency rate and a dramatically greater number of total days lost.[10]

B. Pregnancy Is Unique in Its Cost Impact upon Benefits Programs

Calculations based on data collected by the Bell System Companies also confirm that coverage of normal pregnancy would generate a significantly greater number of total disability days than any other category of sickness or injury for men and women combined.

Based on a substantial survey, it was determined that female Bell System employees experienced approximately 21,700 pregnancies in fiscal year 1970-1971, and approximately 23,000 pregnancies in fiscal year 1971-1972. It is impossible to fix precisely the average term for which benefits would have been provided if normal pregnancy had been covered, since estimates of the period of actual disability connected with normal pregnancy range from less than six weeks to six months.[11] However, assuming an average duration of eight weeks, normal pregnancy would have accounted for 1,215,200 disability days in 1970-1971 and 1,288,000 disability days in 1971-1972. Had normal pregnancy been compensated, women, who represented 49 percent of the System's work force in 1970-1971, would have received benefits for 72 percent of the total disability days. In 1971-1972 women would have accounted for 71 percent of all benefit days though constituting only 48 percent of total employees eligible for benefits.

Based on these calculations, together with the average salary and seniority of eligible women, system-wide costs for disability benefits would have been increased by $15,762,663 in 1970-1971 and $19,037,330 in 1971-1972.[12] However, the impact on the present distribution of sickness and accident disability benefits would be even more dramatic. If pregnancy had been covered in both of the survey years, 5 percent of eligible women, or approximately 2.5 percent of the Companies' work force, would have accounted for approximately 21 percent of the total days for which disability benefit payments were made. No other single disability group—even including both sexes—could generate so large a number of disability days for which benefits would be paid.

---

[10] In both 1970-71 and 1971-72, women accounted for almost six times as many lost days as men in this classification:

	Women	Men
1970-71	374,707	66,982
1971-72	391,224	71,290

[11] *See* Appendix at 6a-7a. The Court has recognized the "plethora of conflicting medical testimony," on the duration of any inability to work connected with pregnancy. *Cleveland Bd. of Educ.* v. *La Fleur*, 414 U.S. 632 (1974).

[12] Pregnancy alone would have accounted for 14.47% and 13.90% of all benefits paid in the respective survey years. These estimates reflect only basic disability costs, and do not include wage-related costs such as Social Security, pensions, health insurance, etc. Moreover, the estimate is based on the assumption of an average disability period of eight weeks. Payment for the full average maternity leave period of 5½ months would have increased these costs to $32,739,007 and $39,539,070 respectively.

C. The Low Return Rate Makes Maternity Leaves Unlike Sickness and Accident Disabilities for Job-Related Purposes

Title VII does not require private employers to provide any sick leave or disability benefits, and the Bell System Companies submit that the decision to provide some form of protection against illness and injury should not obligate an employer to provide benefits for another condition which cannot properly be classified as either an illness or an injury. The Bell System Companies also submit that absences from work for pregnancy and childbirth are substantially different from absences caused by sickness or accident disabilities. Perhaps the most significant distinction for private employers, who consider disability benefits as part of an overall compensation package, is the difference in return rates for the workers in each category.

A survey of maternity leaves and absences caused by sickness and accident disabilities conducted by Illinois Bell in 1972 showed that only about 3%[13] of those who had been disabled failed to return to work while over 48 percent of employees who took maternity leave did not return following their leave. Using these figures to project costs to the System as a whole, 6.6 and 9.1 million dollars of the estimated costs of providing maternity benefits in the respective survey years, would have been paid to claimants who never returned to work. These payments would have been inconsistent with the disability programs' basic purpose of providing a bridge between periods of employment and would have constituted a unique form of severance pay.

[13] The vast majority (almost 90%) of those who did not return to work following a covered disability had either died or become eligible for a company pension.

II. THIS COURT HAS DECIDED THAT THE EXCLUSION OF NORMAL PREGNANCY FROM COVERAGE UNDER A DISABILITY BENEFITS PLAN DOES NOT CONSTITUTE DISCRIMINATION ON THE BASIS OF SEX

In *Aiello,* the Court held that the Equal Protection Clause of the Fourteenth Amendment does not require California to cover absences due to normal pregnancy under a state-administered disability benefits plan. In the course of determining that the California program did not discriminate against *any* definable group or class, the Court explicitly held that the exclusion of pregnancy does not constitute discrimination on the basis of sex, noting that "[t]here is no risk from which men are protected and women are not."[14] As the Court further stated:

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed,* 404 U.S. 71, and *Frontiero* v. *Richardson,* 411 U.S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes *one physical condition*—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, *it does not follow that every legislative classification concerning pregnancy is a sex-based classification* like those considered in *Reed, supra,* and *Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics.*
>
> * * * *
>
> The lack of identity between the excluded disability and gender as such under this insurance pro-

[14] 417 U.S. at 496-497. This holding follows the Court's previous approach that there can be no denial of equal protection unless a state has acted differently with respect to individuals or groups "similarly circumstanced." *Reed* v. *Reed,* 404 U.S. 71, 75-76 (1971).

gram becomes clear upon the most cursory analysis. *The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.*[15]

The Court in footnote 20 thus expressly held that the exclusion of pregnancy from coverage under a disability program does not constitute sex discrimination.

A. The Court's Decision in Aiello Is Fully Applicable to Employer Disability Benefits Plans under Title VII

The logic of the Court's decision in *Aiello* is fully applicable to cases involving employer disability benefits plans under Title VII. The threshold question in evaluating the exclusion of normal pregnancy from such a plan under Title VII is the same as that presented under the Equal Protection Clause in *Aiello*; does this exclusion constitute sex discrimination? Indeed, the EEOC, AT&T and other parties concerned about the application of Title VII to employer benefit plans recognized that the Court's decision in *Aiello* would have a substantial, if not controlling, effect on interpretations under Title VII involving the differing treatment of pregnancy and sickness. For this reason, many of them filed *amicus curiae* briefs in that case on the issue of whether the exclusion of absences due to normal pregnancy from a disability benefits plan constitutes sex discrimination. As the EEOC stated in its *amicus* brief to the three-judge court in *Aiello*:

> The United States Equal Employment Opportunity Commission files this brief because it believes the standards the Court should apply in

[15] 417 U.S. at 496-497 n. 20 (emphasis added).

> determining the constitutionality of § 2626 of the California Unemployment Insurance Code are similar to the standards which would be applied to the same policy if it were challenged under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-*et seq.*, as amended by the Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103 (March 24, 1972).[16]

Moreover, the dissent in *Aiello* (quoting at length from the EEOC's brief setting forth its interpretation of Title VII) asserted that the exclusion of normal pregnancy from a disability benefits plan constitutes sex discrimination, at least if a comparable and exclusively male condition is not also excluded. The majority emphatically rejected that analysis, stating that such an exclusion is not sex discrimination—

> [a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other. . . .[17]

Finding no evidence that the selection of risks covered discriminated against women in terms of their "aggregate risk protection" the majority decided that the exclusion was neither directly nor by pretext sex discrimination.

The same considerations apply in determining whether an employer discriminates on the basis of sex within the meaning of Title VII by not offering the same benefits for normal pregnancy as for accidents

[16] Brief for the EEOC as *Amicus Curiae* in *Aiello* v. *Hansen*, 359 F. Supp. 792 (N.D. Cal. 1973), *reversed sub nom. Geduldig* v. *Aiello*, 417 U.S. 484 (1974), at 1.

[17] 417 U.S. at 496-497 n.20.

and sicknesses and other temporary disabilities. The court below, on the other hand, sought to differentiate *Aiello* on the basis that "our case is one of statutory interpretation rather than one of constitutional analysis." [18] This distinction not only misses the definitional point of *Aiello,* but also is contrary to persuasive authority holding that the standards under Title VII and the Fourteenth Amendment should be the same.[19] As stated in *Chance* v. *Board of Examiners,*[20] it would be "anomalous at best" if public and private employers were held to different standards under Title VII and the Fourteenth Amendment in cases challenging allegedly discriminatory employment practices.[21]

Certainly, the argument that because only women become pregnant, a sickness plan which excludes normal pregnancy, has a "disparate effect" upon women which constitutes a *prima facie* case of sex discrimina-

---

[18] *Wetzel* v. *Liberty Mutual Ins. Co.,* 511 F.2d 199 (3d Cir. 1975).

[19] There can be no doubt that the development of equal employment opportunity law under Title VII has been significantly affected by concepts first enunciated in equal protection cases. *See e.g., Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), *citing Gaston County* v. *United States,* 395 U.S. 285 (1969) (re educational disadvantage and voting standards); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), *citing Chance* v. *Board of Examiners,* 458 F.2d 1167 (2d Cir. 1972); and *Castro* v. *Beecher,* 459 F.2d 725 (1st Cir. 1972) (both equal protection cases). *See also, Papermakers Local 189* v. *United States,* 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970), *citing, e.g., Louisiana* v. *United States,* 380 U.S. 145 (1965) (re facially neutral standards in voting registration as perpetuating past discrimination).

[20] 458 F.2d 1167, 1176 (2d Cir. 1972).

[21] *Accord, U.S.* v. *Chesterfield County School District,* 484 F.2d 70, 73 (4th Cir. 1973) (". . . the test of validity under Title VII is not different from the test of validity under the Fourteenth Amendment.").

tion ignores the holding of *Aiello* on this precise point. In answer to the same contention, the Court held that the dispositive factor is not whether an isolated condition is covered or not, but whether there is any condition which is covered for one class but not for another, *i.e.,* whether the "aggregate risk protection" derived from the plan discriminates against the complaining class.[22]

Thus, absent a showing of pretext, a case of sex discrimination is not established by proof that a benefits plan treats normal pregnancy differently from disabilities due to other causes. In this regard, the Bell System Companies note that the Court's recognition of the uniqueness of pregnancy made express in *Aiello* what was implicit in its earlier decision in *Cleveland Board of Education* v. *La Fleur.*[23] In *La Fleur,* both the maternity policies approved and those disapproved by the Court were applied by the Board to pregnant women but not to persons otherwise disabled. The Court, however, recognized the unique nature of pregnancy by resolving the Fourteenth Amendment challenge on due process grounds even though the parties and the courts below had framed the issue in terms of whether a sex-based equal protection claim had been stated.

The appropriateness of applying *Aiello* to Title VII cases is further illustrated by this Court's decisions

---

[22] 417 U.S. at 496-497:

> There is no evidence in the record that the selection of risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not. [Footnotes omitted.]

[23] 414 U.S. 632 (1974).

which hold that a Title VII violation does not exist simply because one aspect of an employer policy can be identified which affects employees of one sex, race or ethnic group differently from another. In *McDonnell Douglas Corp.* v. *Green* [24] and *Espinoza* v. *Farah Manufacturing Co.*,[25] the Court used an *Aiello*-like analysis to determine whether the practice violated Title VII. In *Espinoza,* the Court affirmed the decision of the Fifth Circuit that an employer did not discriminate on the basis of national origin simply because it refused to employ aliens. The Court acknowledged that "there may be many situations where discrimination on the basis of citizenship would have the effect of discriminating on the basis of national origin" as where citizenship is used as a pretext to disguise ethnic discrimination.[26] However, the Court found that the company's employment of persons having the same national ancestry as the plaintiff was disproportionately high in the job for which the plaintiff applied, and therefore concluded that the refusal to employ aliens was not a pretext for discrimination.[27]

A similar analysis was followed in *McDonnell Douglas.* There, the Court reversed and remanded a lower

[24] 411 U.S. 792 (1973).

[25] 414 U.S. 86 (1973).

[26] 414 U.S. at 92.

[27] *Id.* at 93. As a result of its finding, the Court declined to give significance to an EEOC Guideline declaring refusal to hire aliens to be a violation of Title VII since the Guideline's premise ". . . that discrimination on the basis of citizenship has the effect of discrimination on the basis of national origin—is not borne out." 414 U.S. at 93. For a fuller discussion of the appropriate treatment of EEOC Guidelines in such cases, *see* discussion at pp. 17-19, *infra.*

court decision which had held that an employer discriminated against a black employee by refusing to rehire him because of his involvement in a civil rights demonstration which unlawfully obstructed access to the employer's work place. While stressing that Title VII does not permit an individual's prior unlawful conduct to be used as a pretext for racial discrimination, the Court concluded that

> . . . in the absence of proof of pretextual or discriminatory application of such a reason, this cannot be thought the kind of "artificial, arbitrary, and unnecessary barriers to employment" which the Court found to be the intention of Congress to remove. [citation omitted].[28]

In these cases, the Court has called for review under Title VII of whether challenged employment practices (which are not arbitrary barriers to employment—such as non-job-related tests) are pretexts for discrimination.

A comparison of the distinction challenged in *Phillips* v. *Martin Marietta Corp.*[29] with that involved here and in *Aiello* reveals the logic of the different analytical approaches taken by the Court in applying Title VII. In *Phillips,* the employer had different hiring policies for males and females having pre-school children. Such discrimination on the basis of sex is unlawful, the Court held, at least without a showing that it was based upon factors "relevant to job performance." [30] In contrast, the disability benefits policies at

[28] 411 U.S. at 806. *Compare Griggs* v. *Duke Power Co., supra. See also Albemarle Paper Co.* v. *Moody,* No. 74-389 (U.S., June 25, 1975).

[29] 400 U.S. 542 (1971).

[30] *Id.* at 544.

issue here and in *Aiello* do not differentiate between males and females with identical conditions; it is pregnancy, not parenthood, which is unique. As the Court expressly stated in answer to the same contention in *Aiello*:

> Normal pregnancy is an objectively identifiable physical condition with unique characteristics.[31]

Furthermore, the thrust of the "disparate effect" argument is not limited to sick leave plans which exclude pregnancy. It would seem that, if that argument correctly reflects the law under Title VII, an employer might be required to institute a wage continuation plan for the full spectrum of physical disabilities if, as the Appendix to this Brief illustrates, a substantially higher percentage of females than male employees suffer such disabilities. The necessary implication of the "disparate effect" argument is that the only disabilities for which an employer can lawfully refuse to provide protection are those which the sexes, and races, and ethnic groups, experience in roughly equivalent percentages. Such a conclusion would stand Title VII on its head by requiring employers, in the name of equality, to extend benefits whenever a protected group would gain a *disproportionate* benefit from such an extension.[32]

---

[31] 417 U.S. at 496 n.20.

[32] This is exactly the dilemma which the Court has refused to create for state welfare programs. In *Jefferson* v. *Hackney*, 406 U.S. 535, 548-49 (1972), the Court rejected the same kind of "disparity" argument:

> [G]iven the heterogeneity of the Nation's population, it would only be an infrequent coincidence that the racial composition of each grant class was identical to that of the others. The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however otherwise lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment.

B. The EEOC Guideline That Sick Leave Benefits Should Be Provided for Normal Pregnancy Should Be Rejected in This Case

The court below sought to justify the result it reached by relying on EEOC Guidelines[33] to the effect that the exclusion of normal pregnancy from a disability plan constitutes sex-based discrimination in violation of Title VII. We first point out that these Guidelines were issued before this Court declared in *Aiello* that the exclusion of normal pregnancy is not sex discrimination "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other * * *."[34] Moreover, while that decision is the most definitive statement of reasons why this Court should reject the EEOC Guideline, the Guideline also lacks those attributes which might otherwise warrant this Court's deference.

> As the Court held in *Skidmore* v. *Swift & Co.*:[35]
>
> The weight of . . . [the administrative interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[36]

---

[33] 29 C.F.R. § 1604.10(b).

[34] 417 U.S. at 496-497 n.20.

[35] 323 U.S. 134 (1944).

[36] 323 U.S. at 140.

The importance of these elements was emphasized by the Court in *Espinoza* v. *Farah Manufacturing Co., supra.* The Court there noted that application of the Guideline was inconsistent with the congressionally approved policy of limiting federal employment to United States citizens, and that the then-current Guideline was inconsistent with prior interpretations of the EEOC. Although the Court stated that the EEOC's Guideline "is no doubt entitled to great deference." it concluded that "[c]ourts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong.' "[37]

Evaluation of Section 1604.10(b) in such terms reveals compelling indications that it too is wrong. For the first six years following the effective date of Title VII, EEOC consistently and publicly interpreted the Act as permitting employment practices to take into account the obvious uniqueness of pregnancy.[38] Thus, at least through 1970, the EEOC's position was that employers must grant maternity leave to pregnant employees but that such absences need not be covered as a paid leave under temporary disability plans.[39]

---

[37] 414 U.S. at 94-95.

[38] In its First Annual Report to Congress, at pages 40 and 41, the EEOC stated as follows:

> The prohibition against sex discrimination is especially difficult to apply with respect to the female employee who becomes pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. *The pregnant female, however, has no analogous male counterpart* and *pregnancy necessarily must be treated uniquely.* (Emphasis added.)

[39] *See, e.g.,* Dec. No. 71-308, Sept. 17, 1970, CCH EEOC Decisions ¶ 6170; Dec. No. 71-562, Dec. 4, 1970, CCH EEOC Decisions ¶ 6184; Dec. No. 70-360, Dec. 16, 1969, CCH EEOC Decisions ¶ 6084; Dec. No. 68-4-538E, June 16, 1969, CCH EEOC Decisions ¶ 6125.

During these years, the EEOC's approach to pregnancy continued to follow the Nov. 15, 1966 opinion of its General Counsel, which stated the Commission policy as follows:

> The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex . . . .

This view, and that advanced by this *amicus,* is consistent with the legislative history of the proposed Equal Rights Amendment:

> . . . [T]he original resolution does not require that women must be treated in all respects the same as men. Equality does not mean sameness as a result. The original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex.

S. Rep. No. 92-689, p. 12.

[40] As one court noted in refusing to follow the new Guideline, "There appears to be no factual basis upon which these regulations were drawn." *Newmon* v. *Delta Air Lines, Inc.,* 374 F. Supp. 238 (N.D. Ga. 1973).

The Commission's published policy changed abruptly in 1971 with Decision No. 71-1474. This decision concluded that the exclusion of pregnancy from coverage under a disability benefits plan was discriminatory when all other non-occupationally related disabilities were covered. The decision did not set forth any further rationale for its conclusion or its failure to follow previous Commission policy. Following Decision No. 71-1474, there is no record of further EEOC pronouncements on this subject until the Commission published its revised Guidelines on April 4, 1972, without any accompanying evidentiary support,[40] and without affording any opportunity for public review and comment.

C. The Factual Distinctions Relied upon by the Court Below Do Not Support Its Result

In attempting to distinguish the present case from *Aiello,* the Court of Appeals stressed the fact that Petitioner's plan, unlike California's, excludes from coverage complications of pregnancy as well as normal pregnancy. The court below seized upon this factual difference to invalidate Petitioner's plan as a whole. The Bell System Companies submit that such a result is clearly not warranted by this one difference between the Petitioner's plan here and California's plan in *Aiello.* The proper approach, rather, is to recognize that insofar as Petitioner's plan parallels that at issue in *Aiello, i.e.,* its exclusion from coverage of normal pregnancy, it is permissible under Title VII. It is only the exclusion of complications of pregnancy, which was not at issue in *Aiello,* as to which, conceivably, a different conclusion could be reached.[41] Of course, if this aspect of the plan were found to be unacceptable, the appropriate remedy under "the governing equitable principles established in this Court's decisions"[42] is not to invalidate the plan as a whole, as did the court below, but rather to enjoin only the offending portion of the practices at issue.[43]

---

[41] This practice, as any other, may be challenged on the pretext theory expressly recognized by the Court in *Aiello. See also, Espinoza* v. *Farah Mfg. Co., supra; McDonnell Douglas Corp.* v. *Green, supra.*

[42] *Milliken* v. *Bradley,* 418 U.S. 717, 757 (1974) (Stewart, J., concurring).

[43] *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 179 (1972). As Justice Stewart stated in his concurring opinion in *Millikin* v. *Bradley, supra,* "the nature of the violation determines the stage of the remedy." 418 U.S. at 757.

The importance of separating the practice of excluding complications of pregnancy from that of excluding only normal pregnancy for purposes of analysis and remedy is illustrated by the fact that the plans of many employers, including this *amicus curiae,* cover such complications. See n. 2, *supra,* and accompanying text.

CONCLUSION

For all of the foregoing reasons, the Bell System Companies urge that the decision of the Court of Appeals be reversed.

Respectfully submitted,

CHARLES RYAN
General Attorney
CLARK G. REDICK
Attorney
AMERICAN TELEPHONE AND TELEGRAPH COMPANY
195 Broadway
New York, New York 10017

THOMPSON POWERS
KENNETH I. JONSON
RONALD S. COOPER
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

Attorneys for the Amicus Curiae

APPENDIX

APPENDIX

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
2000 L STREET, NORTHWEST
WASHINGTON, D. C. 20036
202-466-5557

LEE SATTERFIELD
EXECUTIVE ASSISTANT AND ATTORNEY

January 28, 1974

Mr. Philip J. Davis
Director
Office of Federal Contract Compliance
U. S. Department of Labor
14th and Constitution Ave., N.W.
Washington, D. C. 20210

Dear Mr. Davis:

In response to your request, I am transmitting the enclosed data relevant to the proposed revisions to the Office of Federal Contract Compliance Sex Discrimination Guidelines, 38 Fed. Reg. 35336-35338 (Dec. 27, 1973), on behalf of the American Telephone and Telegraph Company and the Associated Bell Companies. This data focuses on proposed Section 60-20.3(h)(2), which provides in part:

> Medically verifiable disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are for all job-related purposes, temporary disabilities and shall be treated as such under any health or temporary disability insurance policies or sick leave plans available in connection with employment . . .

This section would reverse the present position of OFCC that, "There is no requirement that an employee be paid during absence [for maternity leave]." Memorandum of John L. Wilks, Director, OFCC, to Agency Heads, November 12, 1970, at 5.

Without regard to legal arguments against adoption of proposed Section 60-20.3(h)(2), which undoubtedly will be developed by other interested parties, the attached data statistically demonstrates: (1) the present treatment of men and women under the Companies' sickness and accident disability plan; (2) the cost and impact on the male and female share of disability benefits which would occur if normal pregnancy were treated as a sickness or accident; and (3) the fact that nearly half of those taking maternity leave do not return to work which sharply distinguishes the nature of their absence for employee benefit purposes from accident and sickness absences.

Based on this data, as well as the settled medical opinion that pregnancy is neither a sickness nor accident, we urge that OFCC *not* adopt proposed Section 60-20.3(h)(2), but maintain its present position that federal contractors need not provide sickness and accident benefits for pregnancy.

LEE SATTERFIELD
Executive Assistant
& Attorney

Bell System Data Relevant to Proposed Revisions in OFCC Sex Discrimination Guidelines Regarding Treatment of Absences Due to Normal Pregnancy

I. INTRODUCTION

Recently, six companies in the Bell System (Illinois, Southern, South Central, New York, Long Lines and Pacific) have been sued by parties attacking the legality of their sickness and accident disability programs. The crux of these charges is that the failure to treat normal pregnancy as a disability under sickness and accident disability programs, constitutes discrimination against female employees on the basis of sex. Other major employers, such as General Motors, General Electric, and Delta Air

Lines,[1] are facing similar legal challenges, and initial court decisions are now being rendered. For example, a federal district court in Atlanta recently held that Delta Air Lines could not require female employees to leave work at a specific time prior to delivery, but that absence due to pregnancy and childbirth need not be covered under an accident and sickness disability program. *Newmon* v. *Delta Air Lines, Inc.*, Civ. No. I5681 (N.D. Ga., Dec. 31, 1973). *But see, Wetzel* v. *Liberty Mutual Insurance Co.*, Civ. No. 72-169 (W.D. Pa., Jan. 9, 1974).

Since no company in the Bell System treats normal pregnancy as an accident or sickness disability, the implications of these pending cases will reach beyond the companies directly involved. Every company in the System will be affected by the results of these suits. In light of these legal challenges to current sickness and accident disability programs, it is appropriate to review the operation of the Bell System sickness and accident disability program and to estimate its current effect on employees and the effects which would result by treating pregnancy as a sickness or accident disability.

II. PRESENT DISABILITY PLANS

The sickness and accident disabilities of Bell System employees are classified, for record keeping purposes, into seventeen basic groups (see Table 1) which cover every disability recognized under the various plans within the System. For example, disabilities are grouped into infective and parasitic diseases, mental disorders, diseases of the circulatory system, the digestive system, the musculoskeletal system, and even accidents, poisonings and violence. Within each of these groups, the System's records reflect, by sex, the frequency of occurrence of each

---

[1] Grogg v. General Motors Corp., 73 Civ. No. 63 (KTD) (S.D. N.Y.); Gilbert v. General Electric Co., No. 142-72-R (E.D. Va.); Newmon v. Delta Air Lines, Inc., Civ. No. I5681 (N.D. Ga.).

group of disability, the number of disability absences, and the duration of these absences (see Tables 2 and 3).

An examination of the Bell System sickness and accident disability figures for the fiscal year 1970-71 (see Table 2), reveals that in sixteen of the seventeen disability group classifications the frequency rate of women absent from work was higher than for men; the number of cases of women disabled was higher than for men; and women lost more total days from work than men.[2] Finally, an examination of the severity rate (average duration) of these absences indicates that women were generally absent for a longer period than men. While women were 48.57% of the System's total work force eligible to receive disability payments as of December 31, 1970, a review of the System's disability statistics, including all disability groups, reveals that they received wage benefits for 64.65% of the total days for which such benefits were paid during fiscal year 1970-71. Thus, even without treating normal pregnancy as a sickness or accident disability, in fiscal year 1970-71 women collected benefits for a percentage of days far in excess of their percentage of the company work force. It should be recognized that wage replacement benefits were paid to women absent on account of complications of pregnancy and childbirth.[3]

Fiscal year 1971-72 reflects the same sort of pattern as 1970-71 (see Table 3). In the same sixteen of seventeen disability group classifications, women were absent at a higher rate than men; experienced more disabilities than men; and lost more days from work than men. Finally, the statistics again show that generally, when absent, women were absent for longer periods than men. Although

[2] The one disability group category where men are absent at a higher rate than women, experience more disabilities than women, and lose more disability days than women is diseases of the circulatory system, which includes heart attacks and similar cardiac problems. (See Tables 2 and 3.)

[3] See classifications 11 and 15, Tables 1, 2, and 3.

women made up 48.29% of the Bell work force eligible for disability payments as of December 31, 1971, they accounted for 63.45% of the total days for which benefits were paid in all disability groups during fiscal year 1971-72. Again this disproportionate figure reflects the present operation of the Bell Companies' disability programs, which are under attack, and which do not treat normal pregnancy as a sickness or accident disability.

III. The Effect of Treating Pregnancy As A Sickness or Accident Disability

Since disability payments for pregnancies would be made only to women, treating normal pregnancy as a sickness or accident disability would mean that women employees would receive even greater benefits than the disproportionate benefits they already receive.

In late 1973, eight companies in the System performed a manual count of the number of maternity leaves that had been granted in 1972. These companies then compared this count with the total number of female employees as of December 31, 1972. The results are as follows:

Company	Number of Maternity Leaves Granted in 1972	Number of Female Employees as of December 31, 1972	Percent
New York	2,406	48,115	5.00
New Jersey	761	16,113	4.73
Chesapeake and Potomac	1,274	23,861	5.34
Ohio	732	13,321	5.50
Illinois	1,036	20,968	4.94
Northwestern	834	14,596	5.72
Southwestern	1,700	39,316	4.33
Pacific Northwest	533	9,969	5.35
Totals	9,276	186,259	4.98

By projecting the results of this eight company survey,[4] a fairly accurate estimate can be made of the System-wide effect of treating pregnancy as a sickness or accident disability.

The Bell System Companies employed approximately 434,400 women eligible for disability benefits in fiscal year 1970-71 (as of December 31, 1970). Assuming 5% of these women took maternity leave in that fiscal year, the System would have had to provide disability payments for approximately 21,700 pregnancies if maternity had been treated as a sickness and accident disability during this period. No figures have yet been compiled that accurately reflect the average length of maternity leave taken throughout the System; nevertheless, figures compiled by Illinois Bell indicate that within the Company the average maternity leave per pregnancy has been approximately 5½ months. Of course, it is reasonable to assume that most women would not be disabled for 5½ months as a result of normal pregnancy and childbirth. Indeed, the testimony of medical experts for both sides in a court action pending against General Electric (see note 1 *supra*) that is similar to the suits the Bell Companies are facing indicates that the total period of disability may be less than six weeks. However, two courts have held in a related context that eight weeks may be an appropriate estimate of the time necessarily lost from work due to pregnancy.[5] Using such an eight week period for calculations, and keeping in mind that the actual period could be found to be considerably

---

[4] The companies involved in this count have almost 40% of the System's female employees and represent a cross section of the entire Bell System. Thus, there is no reason to believe that the composite figures presented by this survey would not be valid estimates of figures for the entire System.

[5] Health v. Westerfield Board of Education, 345 F. Supp. 501 (S.D. Ohio, 1972); Doe v. Osteopathic Hospital, 3 FEP 1128 (D. Kans. 1971).

longer, or shorter,[6] if the estimated 21,700 women who took maternity leave in fiscal year 1971 had received disability benefits for eight weeks each, an additional 1,215,200 disability days would have been covered in that year. Thus, instead of receiving benefits for almost 65% of the days for which disability payments were made, women, who represented approximately 49% of the System work force eligible for benefits during this period, would have received benefits for over 72% of the days for which disability payments were made.

Similarly, if 5% of the System's fiscal year 1971-72 female work force eligible for disability benefits, approximately 461,500 women as of December 31, 1971, had received disability benefits for maternity absence in that period, a total of approximately 23,000 pregnancies would have been covered. Assuming disability payments had been made for an average of eight weeks for each of these pregnancies an additional 1,288,000 disability days would have been paid in 1971-72. Therefore, women, who represented approximately 48% of the System work force during that period, would have collected 71% of the total disability days.

---

[6] A recent example of the conceivable magnitude of payment periods occurred in Illinois. The State Fair Employment Practices Commission awarded two claimants disability payments for the full six of their maternity leaves. Elliott v. Turner Co., (Charge No. 72C-1155, December 12, 1973); Bennett v. Turner Co., (Charge No. 72C-1156, December 12, 1973). If the estimated 21,700 women who took maternity leaves in the System during fiscal year 1970-71 had received disability payments for the entire period of their 5½ month maternity leave (145 days), an additional 3,146,500 days of disability benefits would have been paid in the System. In other words, pregnant women would have received benefits due to their pregnancies for more disability days than all other women received for their non-pregnancy related disability absences; furthermore, pregnant women would have been paid for nearly twice as many disability days due to their pregnancies than were paid to men for all their disabilities!

If pregnancy had been covered during these periods as an eight week disability, 5% of the women, or approximately *2.5% of the System's work force, would have accounted for approximately 21% of the total days for which disability payments were made* in both fiscal years 1970-71 and 1971-72. No other single disability group—even including both sexes—could generate so large a number of disability days for which benefits would be paid.

These figures demonstrate that treating pregnancy as a sickness or accident disability would create a situation far different from the picture of "equality" painted by opponents of the present disability programs. Indeed, the statistics reveal that women employees already are receiving a significantly greater number of paid benefit days for disabilities than are male employees. Treating pregnancy as a sickness or accident disability would further reduce the percentage of disability days paid to male employees.

Moreover, there can be no doubt that cost of treating normal pregnancy as a sickness or accident disability would be immense. Using the previously mentioned figures which were compiled in late 1973 as the basis for projection, representative costs can readily be estimated. All employees are entitled to disability wage payments on the basis of seniority. An Illinois Bell study indicates that the average seniority of women taking maternity leave is between two and five years. Employees with 2-5 years service may receive up to full wage pay for their first week of absence as a departmental expense paid by the Company. Disability plan wage payments begin on the eighth calendar day of absence . During the first four weeks of a disability period, an employee with 2-5 years of service receives full wage pay. Subsequently, for a forty-eight week period disability payments equalling one-half the weekly salary are paid.

The average weekly wage of women with 2-5 years seniority, who were employed by the System Telephone Operating Companies in fiscal year 1970-71 as of December 31, 1970, was $111.75. If eight weeks of disability benefits had been made to pregnant employees, using the average length of Company service of those taking maternity leave during this period and the average wage of these female employees during 1970-71, the cost impact of wage continuation payments that would result from treating pregnancy as a sickness or accident disability can be estimated. Given the figures discussed above, the wage costs of treating each pregnancy as an eight week disability would have been $726.39 per pregnancy.[7] The System-wide costs for all 21,700 pregnancies in fiscal year 1970-71 would have been $15,762,663 in basic wages; in other words, approximately 2.5% of the System's work force would have received 14.4% of the basic wage benefit dollar. This does not include other wage related costs such as Social Security, pensions, health insurance, etc.[8]

The figures for fiscal year 1971-72 are comparable. The average weekly wage of female employees with 2-5 years seniority, who were employed during this period as of December 31, 1971 was $127.34. Assuming the same seniority and average disability figures applied to fiscal year 1970-71 above, the wage costs of treating each 1971-72 pregnancy as a sickness and accident disability would have been $827.71. The costs for all 23,000 pregnancies within the System during this period would have been $19,037,-

---

[7] This assumes that a pregnant employee received full wages for her first week of absence (which may be paid by the Company as a departmental expense), followed by full pay for the next four weeks' absence and half pay for the last three weeks' absence under the Company's disability plan.

[8] This also does not include the cost of establishing and administering a program to determine the length of each normal pregnancy disability and the amount of disability payments to be made for each such pregnancy.

330[9] in basic wages, not including other wage related costs. Again, had normal pregnancy been treated as a sickness and accident disability, a significant portion of the basic wage benefit dollar (13.90%) would have been concentrated in a small percentage of the work force (approximately 2.5%).

IV. Maternity Leave Return Rate

No system-wide figures indicating the precise work return rate from maternity leave and other disablities have yet been prepared; nevertheless, Illinois Bell Telephone Company recently completed such a study. The results clearly established another factor indicating the questionable equity and financial wisdom of treating pregnancy as though it were a sickness or accident disablity. The Illinois study reveals that in calendar year 1972 all but approximately 3% of those employees who were absent as a result of presently covered sickness and accident disabilities returned to work.[10] By comparison, however, during the same period more than 48% of employees who took maternity leave did not return to the Illinois Bell work force following their leave. Projecting the results of this study to the entire System, the inequity of covering pregnancy as a sickness or accident disability is manifest. If

---

[9] These figures represent an average of eight weeks disability for each pregnancy. As noted earlier, see footnote 6, this figure could be increased significantly by administrative or judicial decisions. If the entire period of an average 5½ month maternity leave were treated as a disability for purposes of the sickness and accident program, the fiscal year 1971 and 1972 costs of the Bell Companies in basic wages alone would have been $32,739,007 and $39,539,070 respectively.

[10] The vast majority (almost 90%) of employees who did not return to work after absences as a result of presently covered sickness and accident disabilities either died or became eligible for company pensions. Only 0.57% of Illinois Bell's employees actually resigned from company services after absences presently covered by the sickness and accident disability program.

the treatment of pregnancy as a sickness or accident disability would have accounted for between approximately 15.7 million dollars of basic wage benefit payments in fiscal year 1971 and 19.0 million dollars in fiscal year 1972 (assuming an eight week disability period for both fiscal years) approximately 7.6 and 9.1 million dollars of the yearly wage benefits paid in these respective fiscal years would have gone to claimants who never returned to work! These wage payments would not have served as a bridge to carry workers between periods of employment, which is the basic purpose of disability benefits, but instead would have constituted a unique form of severance pay.

V. Conclusion

The statistical evidence discussed above highlights the effects of treating pregnancy as a sickness and accident disability. An examination of this evidence raises serious doubts about the equity of so treating pregnancies. Already women receive wage benefits for days of absence as a result of sickness and accident disability that are greatly disproportionate to the wage continuation benefits which men receive. Treating pregnancy as a sickness and accident disability no matter how brief the average period of such disability, can only further distort this important benefit in favor of female employees. The cost impact of accomplishing this questionable result will be immense. Furthermore, the wage benefit payments received under this coverage, although amounting to millions of dollars, will inure to the benefit of only 5% of the Bell Companies' female employees—less than 2.5% of the work force. Finally, a look at the work return rates of employees taking maternity leave indicates that nearly half of the benefits paid for pregnancy would be paid to women who will never return to the System's work force.

Table 1

Sickness and Accident Summary Bell System

Group 01 Infective and parasitic diseases
Group 02 Neoplasms
Group 03 Endocrine, nutritional and metabolic diseases
Group 04 Diseases of blood and blood-forming organs
Group 05 Mental disorders
Group 06 Diseases of nervous system and sense organs
Group 07 Diseases of circulatory system
Group 08 Diseases of respiratory system
Group 09 Diseases of digestive system
Group 10 Diseases of genitourinary system
Group 11 Complications of pregnancy, childbirth and puerperium
Group 12 Diseases of skin and subcutaneous tissue
Group 13 Disease of musculoskeletal system and connective tissue
Group 14 Congenital anomalies
Group 15 Perinatal morbidity and mortality
Group 16 Symptoms and ill-defined conditions
Group 17 Accidents, poisonings and violence

Table 2

Total Bell System Sickness and Accident Figures for Fiscal Year 1970-71

Disability Category	Sex	No. of Cases	Frequency Rate Per 1,000 Employees	Severity Rate (average duration of illness)	Total Days Lost
01	M	2,726	5.9	26.3	71,647
	F	5,422	12.5	27.1	146,930
02	M	1,204	2.6	66.6	80,173
	F	4,991	11.5	55.6	277,647
03	M	745	1.6	38.9	28,951
	F	1,134	2.6	51.8	58,785

Disability Category	Sex	No. of Cases	Frequency Rate Per 1,000 Employees	Severity Rate (average duration of illness)	Total Days Lost
04	M	93	0.2	40.6	3,774
	F	535	1.2	36.7	19,634
05	M	1,527	3.3	57.2	87,285
	F	3,306	7.6	67.6	223,503
06	M	1,560	3.4	44.3	69,064
	F	2,592	6.0	42.1	109,132
07	M	4,637	10.1	69.4	321,773
	F	3,582	8.2	62.2	222,723
08	M	8,693	18.9	19.5	169,537
	F	18,397	42.3	19.2	353,955
09	M	5,488	11.9	38.1	208,816
	F	5,744	13.2	41.5	238,532
10	M	2,289	5.0	29.3	66,982
	F	11,137	25.6	33.6	374,707
11	M	—	—	—	—
	F	3,104	7.1	27.8	86,438
12	M	1,154	2.5	25.6	29,574
	F	1,617	3.7	28.6	46,319
13	M	3,941	8.6	46.4	182,686
	F	5,142	11.8	53.0	272,352
14	M	149	0.3	51.6	7,668
	F	304	0.7	42.2	12,822
15	M	—	—	—	—
	F	328	0.8	58.2	19,084
16	M	1,391	3.0	29.8	41,418
	F	2,909	6.7	34.6	100,758
17	M	5,694	12.4	37.4	212,981
	F	7,696	17.7	42.9	330,467

	Days Lost
Male	1,582,329
Female	2,893,788
TOTAL	4,476,117

Table 3

Total Bell System and Accident Figures for Fiscal Year 1971-72

Disability Category	Sex	No. of Cases	Frequency Rate Per 1,000 Employees	Severity Rate (average duration of illness)	Total Days Lost
01	M	2,594	5.2	30.4	78,904
	F	5,108	11.1	29.3	149,470
02	M	1,305	2.6	70.0	91,352
	F	5,390	11.7	57.6	310,518
03	M	719	1.5	45.7	32,832
	F	1,172	2.5	50.1	58,695
04	M	121	0.2	43.5	5,252
	F	462	1.0	43.9	20,281
05	M	1,568	3.2	62.4	97,893
	F	3,445	7.5	66.6	229,558
06	M	1,557	3.2	47.3	73,652
	F	2,584	5.6	44.7	115,477
07	M	5,007	10.1	73.0	365,723
	F	3,950	8.6	61.7	243,865
08	M	10,093	20.4	18.9	191,101
	F	21,789	47.2	18.7	408,365
09	M	5,699	11.5	39.4	224,655
	F	5,994	13.0	42.3	253,522
10	M	2,441	4.9	29.2	71,290
	F	11,262	24.4	34.7	391,224
11	M	—	—	—	—
	F	2,738	5.9	29.0	79,410
12	M	1,325	2.7	28.0	37,150
	F	1,627	3.5	30.1	48,936

Disability Category	Sex	No. of Cases	Frequency Rate Per 1,000 Employees	Severity Rate (average duration of illness)	Total Days Lost
13	M	4,129	8.4	49.4	203,846
	F	5,419	11.7	55.8	302,345
14	M	172	0.3	46.2	7,941
	F	339	0.7	53.5	18,119
15	M	—	—	—	—
	F	255	0.6	59.5	15,164
16	M	1,487	3.0	30.3	45,111
	F	3,103	6.7	38.0	118,036
17	M	6,597	13.3	40.0	264,127
	F	7,904	17.1	43.6	344,862

Days Lost	
Male	1,790,829
Female	3,107,847
TOTAL	4,898,676

Supreme Court, U. S.
FILED
JUL 31 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,
Defendant-Petitioner,
v.
SANDRA WETZEL and MARI ROSS, on behalf
of themselves and all others
similarly situated,
Plaintiffs-Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF PETITIONER

JOHN G. WAYMAN
SCOTT F. ZIMMERMAN
WALTER P. DEFOREST
MARTHA H. MUNSCH
REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15219
Counsel for *Amicus Curiae*,
Westinghouse Electric Corporation

Of Counsel:
RONALD G. INGHAM
Westinghouse Electric Corporation
Gateway Center
Pittsburgh, Pennsylvania 15222

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

INDEX

	PAGE
Interest Of Westinghouse Electric Corporation	2
Question Presented	3
Statement Of The Case	3
Summary Of Argument	5
Argument	8
I. The Exclusion Of Maternity Benefits From Disability Income Protection Plans Is Not Discrimination Between The Sexes Because The Exclusion Does Not Classify On The Basis Of Sex	8
II. The Exclusion Of Maternity Benefits From Disability Income Protection Plans Does Not Constitute Sex Discrimination Within The Meaning Of Title VII Because Congress Did Not Intend To Outlaw The Exclusion	13
III. The 1972 Guideline Issued By The Equal Employment Opportunity Commission Concerning Disability Due To Pregnancy And Childbirth Is Not Entitled To Judicial Deference	24
A. The EEOC Exceeded The Scope Of Its Authority In Issuing The 1972 Guideline Concerning Pregnancy And Childbirth	25
B. Assuming, *Arguendo,* That The Guideline Concerning Pregnancy And Childbirth Is Interpretative In Nature, The Guideline Is Still Entitled To No Deference By This Court	28
IV. The Decision Of The Third Circuit Is Inconsistent With This Court's Prior Determinations That Cost Is A Legitimate Basis For Employer Conduct; In Addition, Affirmance Of The Third Circuit's Decision Would Have An Undesirable Effect Upon Long-Accepted Employment Practices And Well-Established Legal Principles	31
Conclusion	39

CITATIONS

CASES	PAGE
Accardi v. Pennsylvania R. Co., 383 U.S. 225 (1966)	37
Albemarle Paper Co. v. Moody, 43 U.S.L.W. 4880 (U.S. June 25, 1975)	26, 35
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)	12, 13
Columbia Broadcasting System v. United States, 316 U.S. 407 (1942)	28
Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968)	25
Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973)	28, 29, 30, 36
F.H.A. v. The Darlington Inc., 358 U.S. 84 (1958)	17
Frontiero v. Richardson, 411 U.S. 677 (1973)	11, 12
Geduldig v. Aiello, 417 U.S. 484 (1974)	4, 5, 7-13, 33, 34, 35, 38
Gibson Wine Co. v. Snyder, 194 F.2d 329 (D.C. Cir. 1952)	27
Gilbert v. General Electric Company, 375 F.Supp. 367 (E.D. Va. 1974), *petitions for cert. before judgment filed,* 43 U.S.L.W. 3675 (U.S. June 17, 1975) (Nos. 74-1589 and 74-1590), *affirmed* ..... F.2d ..... (4th Cir., June 27, 1975)	33
Glidden Company v. Zdanok, 370 U.S. 530 (1962)	17
Great Northern Railway Co. v. United States, 315 U.S. 262 (1942)	17
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	35
Helvering v. Credit Alliance Corp., 316 U.S. 107 (1942)	27
Helvering v. Sabine Transportation Co., 318 U.S. 306 (1943)	27
Hou Ching Chow v. Attorney General, 362 F.Supp. 1288 (D.D.C. 1973)	27, 28

	PAGE
Interstate Natural Gas Co. v. Federal Power Commission, 156 F.2d 949 (5th Cir. 1946), *affirmed,* 331 U.S. 682 (1946)	17
Jersey Central Power & Light Co. v. IBEW, 508 F.2d 687 (3d Cir. 1975)	38
Newmon v. Delta Air Lines, Inc., 374 F.Supp. 238 (N.D. Ga. 1973)	31
Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)	12
Reed v. Reed, 404 U.S. 71 (1971)	11, 12
Skidmore v. Swift & Co., 323 U.S. 134 (1944)	29
Stanton v. Stanton, 43 U.S.L.W. 4449 (U.S. April 15, 1975)	12
Udall v. Tallman, 380 U.S. 1 (1965)	30
United States v. Lincoln Rochester Trust Company, 297 F.2d 891 (2d Cir. 1962), *cert. denied,* 369 U.S. 887 (1962)	17
Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed,* 43 U.S. L.W. 3476 (U.S. Feb. 24, 1975) (No. 74-1064)	38
Weinberger v. Wiesenfeld, 43 U.S.L.W. 4393 (U.S. March 19, 1975)	12
Wetzel and Ross v. Liberty Mutual Insurance Company, 511 F.2d 199 (3d Cir. 1975)	4, 8, 10, 13, 16, 24
Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084 (5th Cir. *en banc* 1975)	16

U. S. CONSTITUTION

Equal Rights Amendment	6, 7, 16-23, 29
Fourteenth Amendment	9, 10, 12, 19

FEDERAL STATUTES

Administrative Procedure Act, 5 U.S.C. §553	6, 27, 28, 30
Civil Rights Act of 1964, Title VII, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e, *et seq.*	2-8, 10, 11, 13-16, 23, 25, 26, 28-32, 35-38
Equal Pay Act of 1963, 29 U.S.C. §206(d)(1)	15

PAGE

Military Selective Service Act of 1967, 50 U.S.C.A. App. §459 37
Selective Training and Service Act of 1940, 54 Stat. 890, as amended 37
Universal Military Training and Service Act of 1948 37

STATE STATUTES

California Unemployment Insurance Code, §2601, *et. seq.* 34
Hawaii Temporary Disability Insurance Law, 4 Hawaii Rev. Stat., Title 21, Chapter 392 34
New Jersey Temporary Disability Benefits Law, N.J. Stat. Ann. §43:21-25 34
New York Workmen's Compensation Law, Art. IX, §200-242 34
Rhode Island Temporary Disability Insurance Act, General Laws R.I., §28-39-1 34

LEGISLATIVE HISTORY

110 Cong. Rec. 2482 (1964) 25
110 Cong. Rec. 2484-92 (1964) 13
110 Cong. Rec. 2485 (1964) 15
110 Cong. Rec. 2488 (1964) 14
110 Cong. Rec. 2490 (1964) 14
110 Cong. Rec. 2490-92 (1964) 15
110 Cong. Rec. 2491 (1964) 14
110 Cong. Rec. 2708-09 (1964) 15
110 Cong. Rec. 13168 (1964) 15
117 Cong. Rec. H9368 (daily ed. Oct. 12, 1971) 20
117 Cong. Rec. H9374 (daily ed. Oct. 12, 1971) 20
117 Cong. Rec. H9378 (daily ed. Oct. 12, 1971) 20
117 Cong. Rec. H9383 (daily ed. Oct. 12, 1971) 20
117 Cong. Rec. H9392 (daily ed. Oct. 12, 1971) 17
118 Cong. Rec. S4394 (daily ed. March 21, 1972) 20
118 Cong. Rec. S4612 (daily ed. March 22, 1972) 17
Hearings before Subcomm. 4 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. 40 (1971) 19, 20, 22, 23

PAGE

Hearings on S. J. Res. 61 before the Subcomm. on Constitutional Amendments of the Senate Judiciary Comm., 91st Cong., 2d Sess. (1970) 23
Hearings on S. J. Res. 61 and S. J. Res. 231 before the Sen. Comm. on the Judiciary, 91st Cong., 2d Sess. (1970) 21
H. R. Rep. No. 88-914, 88th Cong., 1st Sess. (1963) 25
H. R. Rep. No. 92-359, 92d Cong., 1st Sess. (1971) 18
S. Rep. No. 92-689, 92d Cong., 1st Sess. (1972) 18

MISCELLANEOUS

29 C.F.R. §800.110 15
29 C.F.R. §800.116(d) 15
29 C.F.R. §1604.10(b) 24
"Current Trends in Pregnancy Benefits—1972 EEOC Guidelines Interpreted," 24 *DePaul L. Rev.* 127 (1974) 31
EEOC General Counsel Opinion Letter, December 9, 1966 30
"The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 *Yale L. J.* 871 (1971) 20
37 Fed. Reg. 6836 (April 5, 1972) 27
Guion, *Personnel Testing* (1965) 35
U. S. Department of Labor, Bureau of Labor Statistics, Digest of 100 Selected Health Insurance Plans Under Collective Bargaining, Early 1966, Bull. No. 1502 (September 1966) 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,
Defendant-Petitioner,
v.
SANDRA WETZEL and MARI ROSS, on behalf
of themselves and all others
similarly situated,
Plaintiffs-Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF PETITIONER

This brief *amicus curiae* is filed by Westinghouse Electric Corporation (hereinafter "Westinghouse") with the consent of all parties,[1] as provided for in Rule 42 of the Rules of this Court.

1. Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

INTEREST OF WESTINGHOUSE ELECTRIC CORPORATION

Westinghouse is engaged in the manufacture of industrial electrical equipment, consumer electrical appliances, electronic equipment, electric motors, jet engines, as well as other electrical items and machinery.

Westinghouse is the defendant in various civil lawsuits presently pending in the United States District Court for the Western District of Pennsylvania in which issues have been raised which are similar to those presented in the instant case. The complaints in those suits alleged, *inter alia,* that Westinghouse has discriminated, and is discriminating, on the basis of sex by maintaining sickness and accident plans which exclude pregnancy from their disability income protection coverage, in violation of Title VII of the Civil Rights Act of 1964, as amended[2] (hereinafter "Title VII"). Plaintiffs in those cases, on behalf of a nationwide class, are seeking, *inter alia,* an injunction requiring the elimination of the pregnancy exclusion from Westinghouse's sickness and accident insurance coverage, and monetary damages for many prior years.

---

2. 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e, *et seq.*

QUESTION PRESENTED

Whether the exclusion of pregnancy from disability income protection plans violates Title VII of the Civil Rights Act of 1964, as amended.

STATEMENT OF THE CASE

Liberty Mutual Insurance Company ("Liberty Mutual") provides as a fringe benefit of employment a Sickness and Accident Income Protection Plan which provides for the payment of income during periods of absence from work resulting from non-occupational "sickness" or "accident." Those benefits are not payable for

> "disability due to pregnancy or any cause related to pregnancy, any act of declared or undeclared war, attempted suicide or intentionally self-inflicted injury, or for any disability which does not require throughout its continuance the regular attendance of a physician licensed to prescribe and administer all drugs and to perform all surgical procedures. No benefits will be paid beyond age 65."[3]

Respondents alleged in their Complaint that the denial of income protection benefits to female employees during absence from work due to pregnancy constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended.

The United States District Court for the Western District of Pennsylvania, on motion for summary judgment, held that the denial of income benefits during a woman's absence from work due to pregnancy does violate Title VII.

---

3. Liberty Mutual Insurance Company, 1970 brochure on Sickness and Accident Income Protection Plan.

The Third Circuit Court of Appeals affirmed, relying heavily upon a 1972 Sex Discrimination Guideline issued by the Equal Employment Opportunity Commission ("EEOC").[4] The Third Circuit dismissed the applicability of this Court's decision in *Geduldig v. Aiello,* 417 U.S. 484 (1974) on the grounds that *Aiello* was a case of constitutional analysis[5] and held that Liberty Mutual's income protection plan violates Title VII because it treats a protected class of persons in a disparate manner.[6]

---

4. *Wetzel and Ross v. Liberty Mutual Insurance Company,* 511 F.2d 199, 205-206 (3d Cir. 1975).

5. *Wetzel, supra,* 511 F.2d at 203.

6. *Wetzel, supra,* 511 F.2d at 206.

SUMMARY OF ARGUMENT

In *Geduldig v. Aiello,* 417 U.S. 484 (1974), this Court held that a disability insurance system which excludes pregnancy, but includes coverage for men and women who suffer from other disabilities, is not sexually discriminatory.

This Court determined in *Aiello* that the relevant classifications resulting from the exclusion of pregnancy are "pregnant women" and "non-pregnant persons," and that such classifications do not discriminate on the basis of sex.

In the instant case the Third Circuit, looking at the same classification system, held that that system discriminated on the basis of sex. The Third Circuit erroneously dismissed the *Aiello* decision on the basis that *Aiello* had involved constitutional interpretation. The Third Circuit did not explain why the *Aiello* determinations of the relevant classification system and the effect of that system upon the sexes were determinations peculiar to constitutional analysis.

The *Aiello* determinations as to the relevant classifications and also that such classifications do not discriminate on the basis of sex are legal principles which were not dependent upon deference to the California legislature and are therefore as applicable to a Title VII case as they are to an Equal Protection case.

Moreover, there is significant evidence that Congress does not intend to outlaw the exclusion of maternity benefits in disability income protection plans. Although the legislative history of Title VII's sex provisions is meager, the comments therein reveal that Congress did not take the view that the sex discrimina-

tion provisions are to be applied against every employer action which affects males and females differently. In addition, the legislative history of the proposed Equal Rights Amendment to the United States Constitution, which has been adopted by Congress, shows that Congress has explicitly disavowed the position that an employment policy or practice constitutes sex discrimination merely because it is based upon a sex-related physical characteristic.

The EEOC's 1972 Guideline concerning pregnancy and childbirth, upon which the Third Circuit heavily relied, is entitled to no judicial deference. The Guideline constitutes a substantive regulation and as such is beyond the scope of the EEOC's statutory authority to issue procedural rules. In addition, prior to adopting the 1972 Guideline, the EEOC failed to give notice or solicit comments regarding the proposed rule as required by Section 4 of the Administrative Procedure Act, 5 U.S.C. §553.

Even assuming the 1972 Guideline were a validly issued interpretative regulation, it would still be entitled to no judicial deference because it fails to meet the criteria which this Court has employed in determining the weight, if any, to be accorded administrative interpretations. The 1972 Guideline was adopted without solicitation of testimony or comments; it is inconsistent with the EEOC's prior opinions issued contemporaneously with the arrival of Title VII; and it is a judgment upon a pure question of law—a matter which is for the courts.

The Third Circuit's opinion also involves important social policy considerations which effect long-accepted employment practices and well-established legal principles. In the instant case the Court of Appeals held that

because a policy operates to the disadvantage of a particular subgroup (pregnant women), of a larger group protected from discrimination by Title VII (women), the policy is *per se* a violation of that statute. Under the Court of Appeals' decision it is irrelevant that the employer may have acted without intention to discriminate and for a highly legitimate business reason—in fact the essential business reason—cost considerations. If this Court affirmed the decision of the Third Circuit, then it would be advising employers that an employment practice which disadvantages a subgroup of a larger group protected by Title VII is *per se* illegal even though the practice is undertaken for legitimate business reasons.

Accordingly, this Court should reverse the decision of the Third Circuit because (1) the Third Circuit's decision does not involve the elimination of sex discrimination but instead involves the imposition of the cost of childbearing upon the employer and upon the entire employee workforce; (2) affirmance would create gross cost inequities between employers in states with public disability plans, such as that approved by this Court in *Aiello,* and employers in states which lack such a plan; and (3) affirmance would be inconsistent with the prior decisions of this Court which have recognized cost as a legitimate basis for employment practices.

When these policy considerations are added to the *Aiello* precedent and the strong congressional intent reflected in the legislative history of the Equal Rights Amendment, we submit that this Court should hold that the exclusion of pregnancy from a disability income protection plan is not a violation of Title VII.

ARGUMENT

I. The Exclusion Of Maternity Benefits From Disability Income Protection Plans Is Not Discrimination Between The Sexes Because The Exclusion Does Not Classify On The Basis Of Sex.

The Court of Appeals held, *inter alia,* that Liberty Mutual's disability income protection plan violates Title VII of the Civil Rights Act of 1964[7] "by excluding pregnancy benefits from coverage while including other kinds of temporary disabilities."[8] The Court below explained that although Liberty Mutual's plan is neutral on its face, it "treats a protected class of persons in a disparate manner."[9]

This determination by the Court of Appeals conflicts with prior decisions of this Court and is clearly erroneous.

This Court in the case of *Geduldig v. Aiello,* 417 U.S. 484 (1974), explicitly held that an insurance plan

---

7. Title VII provides in pertinent part as follows:

"It shall be unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex; or

(2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex."

8. *Wetzel, supra,* 511 F.2d at 207.

9. *Wetzel, supra,* 511 F.2d at 206.

which excludes pregnant women, but includes both men and women who suffer from disabilities other than those related to pregnancy and childbirth, does not discriminate on the basis of sex.

The *Aiello* case involved a challenge to the constitutionality of the disability insurance system of the State of California under which benefits were paid to persons in private employment who were temporarily unable to work because of disability not covered by workmen's compensation. The California plan excluded from coverage disabilities that were attributable to pregnancy. The District Court held that the exclusion of such disabilities violated the Equal Protection clause of the Fourteenth Amendment.

This Court reversed, holding that the "pregnancy exclusion" did not constitute sex discrimination in violation of the Equal Protection clause. This Court stated that:

> "There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.[20] There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." [Footnote 20 is that of the Court.][10]

In footnote twenty to the *Aiello* opinion this Court explained its holding that the exclusion was not sex discrimination:

---

10. *Aiello, supra,* 417 U.S. at 496-497.

> "The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes."[11]

In the instant case, the Third Circuit dismissed the applicability of *Aiello* on the grounds that *Aiello* was a case of constitutional analysis wherein deference was shown to the legislative judgment of the State of California in balancing public social welfare interests with the Constitution.[12]

It is true that a portion of the *Aiello* decision was devoted to a consideration of the significant economic costs that justified the decision of the California legislature to exclude certain disabilities related to pregnancy. However, the Third Circuit failed to recognize that the conclusion of this Court that the California plan did not involve sex discrimination was central to the Court's conclusion that the Equal Protection clause was not violated.

The Third Circuit's finding that the Liberty Mutual plan treats a protected class of persons in a disparate manner could have been reached only if (a) the Court below failed to accept the *Aiello* classifications quoted above or (b) the Court below, while accepting the *Aiello* classifications, nevertheless determined that a class of "pregnant women" may not be treated differentially under Title VII than "non-pregnant persons."

Both lines of reasoning are erroneous.

---

11. *Aiello, supra,* 417 U.S. at 497.
12. *Wetzel, supra,* 511 F.2d at 203.

First, the Third Circuit erred if it failed to apply the *Aiello* classifications. This Court's determinations in *Aiello* of the relevant classifications resulting from exclusion of pregnancy and whether or not those classifications discriminate on the basis of sex are, in themselves, legal principles which are not dependent upon any economic analysis or legislative deference. These *Aiello* principles are therefore applicable to statutory interpretation as well as constitutional analysis.

Second, assuming the Third Circuit accepted the *Aiello* classifications, it erroneously concluded that a class of pregnant women may not be treated differently from other employees. Title VII prohibits discrimination on the basis of *sex*. This Court explicitly held, in *Aiello,* that "pregnant persons" is not a sex-based classification.[13]

Our interpretation of this Court's decision in *Aiello* is consistent with prior decisions of this Court.

In *Frontiero v. Richardson*[14] and *Reed v. Reed*[15] this Court did not deal with the question of "pregnant persons." Those cases both involved discrimination

---

13. *Aiello, supra,* 417 U.S. at 496, n. 20 ("While it it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . .").
14. 411 U.S. 677 (1973).
15. 404 U.S. 71 (1971).

based upon gender, as such,[16] and were expressly distinguished on this basis in *Aiello*.[17]

Similarly, in *Phillips v. Martin Marietta Corp.*,[18] the alleged discrimination was based solely on sex in that females with pre-school age children were subject to different hiring policies than men with pre-school children. The condition on which the alleged discriminatory action was based in *Martin Marietta, i.e.*, having pre-school children, was a condition which can and does occur among both males and females.

This Court's decision in *Cleveland Board of Education v. LaFleur*,[19] which involved a mandatory leave policy for pregnant teachers, is also clearly reconcilable with *Aiello*. First, *LaFleur* did not hold that the maternity leave regulations were sexually discriminatory within the meaning of the Equal Protection Clause of the Fourteenth Amendment. Rather, this Court held that the Due Process Clause of the Fourteenth Amend-

16. *Frontiero, supra,* concerned the right of a female member of the uniformed services to claim her spouse as a "dependent" for purposes of obtaining increased quarters allowances and medical and dental benefits on an equal footing with male members. *Reed* involved the constitutionality of a mandatory provision of the Idaho probate code that gave preference to men over women when persons of the same entitlement class applied for appointment as administrator of a decedent's estate.

17. *Aiello, supra,* 417 U.S. at 496, n. 20. Distinguishable on the same basis are the recent decisions of this Court in *Stanton v. Stanton,* 43 U.S.L.W. 4449 (U.S. April 15, 1975) and *Weinberger v. Wiesenfeld,* 43 U.S.L.W. 4393 (U.S. March 19, 1975).

18. 400 U.S. 542 (1971).

19. 414 U.S. 632 (1974).

ment prohibited the state government, through the school system, from depriving a teacher of her job upon the basis of arbitrary unwarranted presumptions as to how long a pregnant person can work. Second, the restrictive maternity leave policies in *LaFleur* involved no legitimate cost variables to the employer to justify the withholding or termination of a job, whereas the conveyance of disability benefits is extremely costly.[20]

The Third Circuit's decision is inconsistent with this Court's opinion in *Aiello* and should be reversed.

II. The Exclusion of Maternity Benefits From Disability Income Protection Plans Does Not Constitute Sex Discrimination Within The Meaning of Title VII Because Congress Did Not Intend To Outlaw The Exclusion.

Contrary to the assertions of the Court of Appeals,[21] there is significant evidence that Congress does not intend to outlaw the exclusion of maternity benefits in disability income protection plans.

The legislative history of Title VII pertaining to "sex" is meager.[22] Certainly, there is nothing in that legislative history to suggest that Congress intended

20. *Brief, infra* at 33, n. 59.

21. *Wetzel, supra,* 511 F.2d at 205.

22. *Wetzel, supra,* 511 F.2d at 204.

The prohibition against sex discrimination was added as an amendment by Congressmen Smith of Virginia, probably in an attempt to defeat passage of the entire bill. The amendment was quickly adopted in the House by a vote of 168-133 after cursory debate which covers only nine pages of the Congressional Record. 110 Cong. Rec. 2484-92 (1964).

to outlaw the practice of excluding payment under sickness and accident income protection plans for absences due to pregnancy.

The debate in the House is devoid of any mention as to how biological differences between the sexes would be resolved under Title VII. Congresswoman Green expressed her dismay that problems arising out of such differences had not been considered by the Judiciary Committee prior to its voting on the measure:

> "Because of biological differences between men and women, there are different problems which will arise in regard to employment. These should be carefully considered by the Committee. There will be new problems for business, for managers, for industrial concerns. These should be taken into consideration before any vote is made in favor of the amendment without any hearings at all on the legislation.[23]

The only comments regarding so-called "fringe benefits" of employment such as the disability income protection plan involved in this case negate a finding that the exclusion of pregnancy from such plans is sexually discriminatory. For example, Congresswoman St. George emphasized that women do not want or need special privileges.[24] Congresswoman Kelly[25] stated that she agreed with her colleague, Mrs. St. George, that "fringe benefit" [sic] and the protective laws of the several states would not be destroyed by favorable

23. 110 Cong. Rec. 2491 (1964).
24. 110 Cong. Rec. 2488 (1964).
25. 110 Cong. Rec. 2490 (1964).

action on the amendment relating to sex discrimination.[26]

In the Senate, there was even less comment regarding sex discrimination. The legislative history in the Senate dealt essentially with an amendment offered by Senator Bennett to resolve "possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act."[27]

26. The remainder of the House debate consisted mostly of comments by Southern Congressmen who opposed the Civil Rights Act and included citations to material provided by female proponents of the sex discrimination amendment to the effect that women, *qua* women, were provided no protection under the civil rights bill without the amendment. Every male member of the House voicing support for the inclusion of the amendment (110 Cong. Rec. 2485, 2490-2492) ultimately voted against the civil rights bill (110 Cong. Rec. 2708-2709).

27. 110 Cong. Rec. 13168 (1964). Senator Bennett stated that the purpose of his amendment was to provide that in the event of conflicts, the Equal Pay Act, 29 U.S.C. §206(d)(1), shall not be nullified. The leadership in charge of the bill favored the Bennett Amendment and it was adopted. *Id.*

There is no implication in the Equal Pay Act legislative history that an employer is prohibited from excluding maternity benefits from disability income protection plans. To the contrary, the Secretary of Labor's regulations under the Equal Pay Act exclude "payments related to maternity" from coverage as "wages" under that Act. 29 C.F.R. §800.110. Even if employer contributions for maternity benefits were considered "wages," the Secretary of Labor's regulations specifically approve benefit plans in which equal employer contributions are provided for male and female employees, even though "the benefits which accrue to the employees in question are greater for one sex than for the other." 29 C.F.R. §800.116(d).

Congress did not make any substantive changes with respect to the sex provisions of Title VII in the March, 1972 Amendments thereto. The Third Circuit inferred that such Congressional inaction in 1972 indicates a congressional intent to apply the broad purposes of the statute to sex discrimination and to strike at all discriminatory treatment of men and women.[28] The Third Circuit's analysis of congressional intent begs the question, however, since the issue is not whether Congress intended to provide equal employment opportunity for members of both sexes but whether Congress intended that the particular employment practice in question here constitutes a sexually discriminatory employment practice.

Moreover, the legislative history of the proposed Equal Rights Amendment to the United States Constitution ("ERA")[29] indicates that the denial of maternity

---

28. *Wetzel, supra,* 511 F.2d at 204.

At least one other Court of Appeals has drawn the opposite inference from the Title VII legislative history. In *Willingham v. Macon Telegraph Publishing Co.,* 507 F.2d 1084, 1090 (5th Cir. *en banc* 1975), the Fifth Circuit *en banc* stated:

> "We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate."

29. The ERA requires that:

"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

benefits should not be regarded as discriminatory on the basis of sex.

The legislative history of the ERA constitutes credible evidence of the intent of Congress with respect to sex discrimination matters since the Amendment has been adopted by both houses of Congress.[30] This Court has held that subsequent legislation is entitled to weight in construing the intent of an earlier law dealing with the same subject. *F.H.A. v. The Darlington, Inc.,* 358 U.S. 84, 90 (1958); *Glidden Company v. Zdanok,* 370 U.S. 530, 541 (1962); *Great Northern Railway Co. v. United States,* 315 U.S. 262, 277 (1942).[31]

The legislative history of the ERA clearly shows that Congress has disavowed the position that an employment policy or practice constitutes sex discrimination merely because it is based upon a sex-related physical characteristic.

---

30. The House approved the ERA by a vote of 354-23. H. J. Res. 208, 92d Cong., 1st Sess., 117 Cong. Rec. H9392 (daily ed. Oct. 12, 1971). The Senate approved it by a vote of 84-8. S. J. Res. 122, 92d Cong., 2d Sess., 118 Cong. Rec. S4612 (daily ed. March 22, 1972). The Amendment has been submitted to the states for ratification.

31. The cases cited by Respondents in their "Brief In Opposition To The Petition For Writ Of Certiorari" (p. 12, n. 4) in support of the view that reliance upon the legislative history of the ERA is improper are clearly distinguishable. In *United States v. Lincoln Rochester Trust Company,* 297 F.2d 891 (2d Cir. 1962), *cert. denied,* 369 U.S. 887 (1962) and *Interstate Natural Gas Co. v. Federal Power Commission,* 156 F.2d 949 (5th Cir. 1946), *affirmed* 331 U.S. 682 (1947), the courts disapproved the use of legislative history relating to statutory language which had not been adopted by Congress.

Fourteen of the members of the House Committee on the Judiciary who supported the original version of H. J. Res. 208, the version of the ERA ultimately approved by both houses of Congress, stated as their Separate Views on H. J. Res. 208:[32]

> "The legal principal underlying the Equal Rights amendment as proposed by Mrs. Griffiths [Rep. Martha Griffiths of Michigan] is that the law must deal with the individual attributes of the particular person and not with stereotypes or overclassification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. 'Equality' does not mean 'sameness.' *As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example, a law providing for payment of the medical costs of child bearing could only apply to women.* In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative." [Emphasis added.]

The majority Report of the Senate Judiciary Committee characterized these "Separate Views" as stating "concisely and accurately the understanding of the proponents of the Amendment . . . ."[33]

---

32. H. R. Rep. No. 92-359, 92d Cong., 1st Sess. 7 (1971) (hereinafter cited as H. R. Rep. No. 92-359) (The Separate Views).

33. S. Rep. No. 92-689, 92d Cong., 1st Sess. 12 (1972) (hereinafter cited as S. Rep. No. 92-689). The Senate Report includes several paragraphs from the Separate Views, including the one quoted above.

These Committee Reports were based largely on testimony given at hearings by a number of key supporters of the Amendment, including Congresswoman Griffiths, the sponsor of the ERA in the House. In her testimony, Congresswoman Griffiths explained that there must necessarily be certain limits on "sex discrimination" as that concept would be treated under the Amendment. In explaining what the Amendment would *not* do, she testified:[34]

> "Like private action, governmental action dealing with a physical characteristic unique to one sex would not be affected by the equal rights amendment. Where a law deals with a physical characteristic unique to one sex, equality between the sexes could not be achieved, for such a law could not apply in practice to both sexes. Therefore, the equal rights amendment would not affect laws dealing with a physical characteristic unique to one sex, such as laws governing childbearing, sperm donation, or criminal acts capable of being committed by members of only one sex."

In response to questioning on whether the ERA would prohibit all classifications taking account of sex, Mrs. Griffiths again acknowledged the natural limitation on the scope of the Amendment:[35]

> "But you would have to have some distinction in laws that apply to mothers, to pregnant women, because men aren't pregnant. You don't have to have

---

34. Hearings before Subcomm. 4 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. 40 (1971) (hereinafter cited as ERA House Hearings).

35. ERA House Hearings at 51.

the same law applying because of different functions of the body. The bodies are not exactly the same, so there could be a difference."

Mrs. Griffiths' position was repeatedly adopted by other Congressional supporters of the ERA. Congresswoman Bella Abzug testified that the Amendment would retain sex-based distinctions "where the law could not possibly apply to both sexes, for example, as in the laws against rape."[36] Similarly, during the House debate, Congressman William Ryan pointed out:

> "The basic principle underlying the equal rights amendment is that legal rights must be determined by the actual attributes of an individual, not by sex. This principle does not preclude legitimate differentiation based on the unique physical characteristics of the sexes."[37]

This approach to the general question of what constitutes sex discrimination was endorsed by even those supporters of the ERA who claimed to prefer a broader, more "absolutist" application of the Amendment. Professor Thomas I. Emerson, Lines Professor of Law at The Yale Law School,[38] explained in testimony pre-

---

36. ERA House Hearings at 116.

37. 117 Cong. Rec. H9368 (daily ed. Oct. 12, 1971). To the same effect, see remarks of Congressman Drinan, *Id.* at H9374; Congressman Mitchell, *Id.* at H9378; Congressman Broyhill, *Id.* at H9383; and Senator Gurney, 118 Cong. Rec. S4394 (daily ed. March 21, 1972).

38. Professor Emerson and his co-authors were the first to articulate the "absolute" interpretation of the ERA. Brown, Emerson, Falk, and Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 *Yale L. J.* 871 (1971).

sented to both the House and Senate Committees that the Amendment would not prohibit legislation or other official action dealing with physical characteristics unique to one sex. He testified before the Senate Judiciary Committee that:

> "The fundamental legal principle underlying the equal rights amendment, then, is that the law must deal with the individual attributes of the particular person, not with a vast overclassification based upon the irrelevant factor of sex. It should be noted at this point that there is one type of situation where the law may focus on a sexual characteristic but the basic principle just stated has no application.
>
> "This occurs where the legal system deals directly with a physical characteristic that is unique to one sex. In this situation it could be said that, in a certain sense, the individual obtains a benefit or is subject to a restriction, because he or she belongs to one or the other sex.
>
> "Thus a law providing for payment of the medical costs of childbearing would cover only women, and a law relating to sperm banks would restrict only men. Such legislation cannot be said to deny equal rights to the other sex. There is no basis here for seeking or achieving equality."[39]

And in his testimony before the House Subcommittee, Professor Emerson stated:

> "[T]he equal rights amendment does not preclude legislation, or other official action, which relates to a physical characteristic unique to one sex. Thus

---

39. Hearings on S. J. Res. 61 and S. J. Res. 231, before the Sen. Comm. on the Judiciary, 91st Cong., 2d Sess. 298-99 (1970).

a law relating to wet nurses would cover only women, and a law regulating the donation of sperm would restrict only men. Such legislation does not, however, deny equal rights to the other sex. So long as the characteristics [sic] is found in all women and no men, or all men and no women, the law does not violate the basic principle of the equal rights amendment; for it raises no problem of ignoring individual characteristics in favor of a prevailing group characteristic or an average.

"Instances of laws directly concerned with physical differences found only in one sex are relatively rare. Yet they include many of the examples cited by opponents of the equal rights amendment as demonstrating the nonviability of that proposal. Thus not only would laws concerning wet nurses and sperm donors be permissible but so would laws establishing medical leave for child bearing, though medical leave for child rearing would have to apply to both sexes. Laws punishing forcible rape, which relate to a unique physical characteristic of man, would remain in effect. So would paternity legislation. Laws dealing with homosexual relations would likewise be unaffected, for such laws also deal with physical characteristics pertaining only to one sex."[40]

Similarly, Lucille H. Shriver, Federation Director, The National Federation of Business and Professional Women's Clubs, Inc., observed:

"The significant point always is: Is the distinction one of sex alone or, is there something added or

---

40. ERA House Hearings at 402.

some special function served. On this basis, for example, maternity legislation would not be affected by the equal rights amendment. Maternity legislation affects only females, but any man who could use it certainly would be thereby eligible. The fact is, that maternity legislation can be available only to women because they alone, physiologically, house the prenatal child and childcarrying is the criterion for maternity legislation."[41]

In view of the failure of the ERA to treat a matter such as that involved in this case as sexually discriminatory, it would be anomalous in the extreme to regard it as sex discrimination under Title VII. The legislative history of the ERA in this respect should be viewed as the controlling substitute for the comparatively barren legislative history of Title VII on sex discrimination.

In summary, the above analysis of Congress' concept of sex discrimination under both Title VII and the ERA shows that the denial of maternity benefits from a disability income protection plan should not be regarded as discriminatory on the basis of sex.

---

41. Prepared statement of Ms. Shriver presented to House Subcommittee, ERA House Hearings at 156. *Accord:* testimony of Betty Friedan, founder of National Organization for Women, Hearings on S. J. Res. 61 before the Subcomm. on Constitutional Amendments of the Senate Judiciary Comm., 91st Cong., 2d Sess. 493 (1970) ("The only full special protection that women need is in the matter of maternity and childbering [sic] and none of the so-called protective laws cover this. And furthermore, that is a functional distinction that the equal rights amendment wouldn't touch because men don't bear babies.")

III. The 1972 Guideline Issued by the Equal Employment Opportunity Commission Concerning Disability Due To Pregnancy and Childbirth Is Not Entitled To Judicial Deference.

On April 5, 1972, the Equal Employment Opportunity Commission ("EEOC") issued its revised "Guidelines on Discrimination Because of Sex" to require that health or temporary disability insurance plans cover disability due to pregnancy or childbirth on the same terms as they cover other temporary disabilities.[42]

The Court of Appeals erroneously relied on the 1972 guideline concerning pregnancy and childbirth in holding that it is sexually discriminatory for an employer to exclude pregnancy benefits from a disability income protection plan that includes other kinds of temporary disabilities.[43]

The EEOC's 1972 guideline concerning pregnancy and childbirth is entitled to no judicial deference because (1) the guideline constitutes a substantive rule which the EEOC has no statutory authority to issue and it is therefore invalid; and (2) even assuming, *arguendo,* that the guideline were an "interpretative" rather than a "substantive" rule and as such within the EEOC's rule-making power, the guideline fails to meet the criteria which this Court has employed in determining the weight, if any, to be accorded such administrative interpretations.

---

42. 29 C.F.R. §1604.10(b).

43. *Wetzel, supra,* 511 F.2d at 205-206.

A. The EEOC Exceeded The Scope Of Its Authority In Issuing The 1972 Guideline Concerning Pregnancy And Childbirth.

Section 713(a) of the Act provides that the EEOC "shall have authority from time to time to issue, amend, or rescind suitable *procedural* regulations to carry out the provisions" of Title VII.[44] The original bill as reported out of the Judiciary Committee of the House of Representatives did not contain the word "procedural."[45] The word "procedural" was inserted on the House floor pursuant to an amendment offered by Congressman Cellar[46] and was intended as a mandate to the Commission that it was not to have authority to make substantive rules and regulations.[47]

The EEOC violated this congressional mandate when it issued its 1972 guideline concerning pregnancy and childbirth. The guideline constitutes a substantive legislative rule. It affects virtually all disability and sick

---

44. 42 U.S.C. §2000e-12 (emphasis added).

45. H. R. Rep. No. 88-914, 88th Cong., 1st Sess. (1963).

46. 110 Cong. Rec. 2482 (1964). The original language was very similar to the rule-making authority of the NLRB as set forth in 29 U.S.C. §156:

> "The Board shall have authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this subchapter."

47. In *Dobbins v. Local 212, IBEW,* 292 F.Supp. 413, 449 (S.D. Ohio 1968), the Court observed:

> "We note first that the agency charged with the enforcement of Title VII, the Equal Employment Opportunity Commission, is authorized by Congress only to issue 'suitable *procedural* regulations.' That excludes substantive and the history of the adoption of the Act bears this out." (italics in original).

leave plans in effect in the United States[48] and represents a complete reversal of the prior EEOC policy and announced position.[49] More significantly, the guideline requires fundamental and drastic changes in industry insurance practices, not only by requiring the creation of a new insurance benefit but also by greatly increasing the cost of existing temporary disability insurance and sick leave plans.[50] The guideline purports to answer the ultimate legal question—whether the exclusion of pregnancy is, under Title VII, an illegal classification system—a question which Congress did not address and which the courts must answer. The guideline clearly exceeds the scope of a "procedural" regulation.[51]

---

48. Title VII covers virtually all employers, both public and private, throughout the United States and almost every such employer in the United States either excludes absence due to pregnancy from sickness and accident benefit coverage or limits such coverage more strictly than coverage for sickness or accident. *See e.g.*, U. S. Department of Labor, Bureau of Labor Statistics, Digest of 100 Selected Health Insurance Plans Under Collective Bargaining, Early 1966, Bull. No. 1502 (September 1966).

49. *Brief, infra,* at 30.

50. *Brief, infra,* at 33.

51. Compare the EEOC guideline discussed in *Albemarle Paper Co. v. Moody,* 43 U.S.L.W. 4880 (U.S. June 25, 1975) which consists of the EEOC's interpretation of specific statutory language in connection with the validation of an employer's pre-employment tests pursuant to §703(1) of Title VII. Unlike the guideline in *Albemarle,* the EEOC's 1972 guideline concerning pregnancy and childbirth is not based upon a provision in the statute. The EEOC testing guidelines were also adopted pursuant to extensive commentary and assistance from professional psychologists. No such outside testimony was sought by the EEOC on its 1972 maternity guideline. *Brief, infra,* at 31.

This Court has not hesitated in the past to invalidate administrative rules which exceeded the scope of agency authority. *Helvering v. Sabine Transportation Co.,* 318 U.S. 306, 311-312 (1943); *Helvering v. Credit Alliance Corp.,* 316 U.S. 107, 113 (1942).

The guideline concerning pregnancy and childbirth is invalid for the further reason that the EEOC failed to comply with the requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. §553, in issuing the guideline.

Section 4 requires that before an agency adopts a rule, notice must be published in the Federal Register and interested parties must be given an opportunity to comment. No such notice or opportunity to comment was given before the EEOC promulgated the 1972 guideline concerning pregnancy and childbirth.

The requirements of Section 4 apply to "substantive legislative rules and regulations" which "create law, usually implementary to an existing law." *Gibson Wine Co., Inc. v. Snyder,* 194 F.2d 329, 331 (D.C. Cir. 1952). Section 4 does not apply to an agency's "interpretative rules," which "are statements as to what the administrative officer thinks the statute or regulation means." *Gibson, supra,* at 331.

The EEOC has characterized its 1972 guideline concerning pregnancy and childbirth as "interpretative in nature."[52] This Court, however, is not bound by the label attached by the administrative agency but instead must look to such factors as the real effect of the rule, the source of authority for its promulgation, and the force and effect which attaches to the rule itself. *Hou*

---

52. 37 Fed. Reg. 6836 (April 5, 1972).

Ching Chow v. Attorney General, 362 F.Supp. 1288, 1292 (D.D.C. 1973).[53] As discussed above, the Commission's 1972 guideline attempts to create a substantive employment standard which must be met by employers. Thus, even if the EEOC had the statutory authority to issue substantive regulations, the 1972 guideline concerning pregnancy and childbirth nevertheless would be invalid because it was not issued pursuant to the requirements of the Administrative Procedure Act.

B. ASSUMING, *Arguendo,* THAT THE GUIDELINE CONCERNING PREGNANCY AND CHILDBIRTH IS INTERPRETATIVE IN NATURE, THE GUIDELINE IS STILL ENTITLED TO NO DEFERENCE BY THIS COURT.

Assuming, *arguendo,* that the EEOC's 1972 guideline concerning pregnancy and childbirth is "interpretative" rather than "substantive" in nature and that the EEOC possesses the statutory authority to issue an "interpretative" regulation, the guideline is, in any event, not entitled to judicial deference.

This Court has set forth various standards to be followed by the judiciary in determining the weight, if any, to be accorded an administrative agency's interpretation of a statutory provision.

In *Espinoza v. Farah Manufacturing Co.,* 414 U.S. 86 (1973) this Court rejected the EEOC's interpretation of the phrase "national origin" in §703 of Title VII,

---

53. *See also Columbia Broadcasting System, Inc. v. United States,* 316 U.S. 407, 416 (1942) ("The particular label placed upon [the commission's order] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive.")

explaining that deference to administrative guidelines must have limits where "application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question."[54]

In *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944), a case involving certain interpretative judgments issued by the Wage and Hour Administrator under the Fair Labor Standards Act, this Court noted, *inter alia,* the following criteria to be considered in evaluating an administrative regulation: the degree to which the regulation involved judgment in an area where the administrator had special expertise; its consistency with earlier and later pronouncements; and the thoroughness of the agency's consideration.

Application of the *Espinoza* and *Skidmore* criteria to the EEOC's 1972 guideline concerning pregnancy and childbirth indicates that the guideline meets none of these criteria and should therefore be accorded no deference by the Courts.

First, application of the guideline concerning pregnancy and childbirth would be inconsistent with the intent of Congress. As discussed *supra* at 13-16, there is nothing in the legislative history of Title VII to indicate that Congress intended to outlaw the practice of excluding payment under sickness and accident income protection plans for absences due to pregnancy. Moreover, when Congress re-enacted the Title VII legislation in March of 1972, the published opinions of the EEOC sanctioned the pregnancy exclusion. Also, the legislative history of the Equal Rights Amendment to the Constitution indicates that Congress does not intend that an

---

54. *Espinoza, supra,* 414 U.S. at 94.

employment policy or practice be held to constitute sex discrimination because it is based upon a sex-related physical characteristic such as pregnancy.[55]

Further, the subject matter of the instant guideline is not a matter as to which the EEOC has special experience or expertise. The guideline involves a question of law, *i.e.,* whether the classification of "pregnant persons" is sex discrimination. That question is for the courts not an administrative agency.

Next, the history of the issuance of the guideline in question indicates that the guideline is not entitled to the judicial deference normally accorded agency interpretations. The 1972 guideline is neither a contemporaneous nor a consistent construction of the statute.[56] Rather, the EEOC's contemporaneous position on the treatment of pregnancy under Title VII appeared in a series of opinion letters issued by the EEOC's General Counsel in 1966.[57] The EEOC's position at that time (and up to April, 1972) was that an insurance plan or other benefit plan may exclude maternity as a covered risk, and such an exclusion would not be discriminatory.

Finally, as pointed out in Part III-A, *supra,* the EEOC did not comply with the notice and comment provisions of the Administrative Procedure Act before it promul-

---

55. *Brief, supra,* at 16-23.

56. In *Udall v. Tallman,* 380 U.S. 1, 16 (1965), this Court noted that contemporaneous constructions of a statute are more likely to be given deference. In *Espinoza v. Farah Manufacturing Co.,* 414 U.S. 86 (1973) this Court found it significant that the EEOC had once held a different view as to the meaning of the phrase "national origin."

57. *E.g.,* General Counsel Opinion Letter, December 9, 1966, which was reported in CCH Employment Practice Guide, December 21, 1966 at ¶17,334.44.

gated its 1972 guideline concerning pregnancy and childbirth. No testimony, comments or opinions were solicited with respect to the guideline.[58] The issuance of the guideline in such manner reveals that the guideline was not thoroughly or objectively considered.

In summary, judged by the above standards, it is clear that the EEOC guideline concerning pregnancy and childbirth is not entitled to judicial deference.

IV. The Decision Of The Third Circuit Is Inconsistent With This Court's Prior Determinations That Cost Is A Legitimate Basis For Employer Conduct; In Addition, Affirmance Of The Third Circuit's Decision Would Have An Undesirable Effect Upon Long-Accepted Employment Practices And Well-Established Legal Principles.

The Third Circuit has held that because a policy operates to the disadvantage of a particular subgroup (pregnant women), of a larger group protected from discrimination by Title VII (women), the policy is *per se* a violation of that statute. Under the Third Circuit's holding it is irrelevant that the employer may have acted

---

58. Ms. Sonia P. Fuentes, the Chief of the Legislative Counsel Division of the EEOC at the time the Sex Discrimination Guidelines were promulgated, admitted that the EEOC had conducted no medical studies prior to issuing the guidelines, and that she was not aware of any financial studies conducted concerning the monetary impact of the guidelines on industry. The Office of Legislative Counsel drafted the guidelines, yet Ms. Fuentes had no expertise in medicine, economics, or labor relations. Deposition Testimony of Ms. Fuentes in *Newmon v. Delta Air Lines, Inc.,* 374 F.Supp. 238 (N.D. Ga. 1973). *See* "Current Trends in Pregnancy Benefits—1972 EEOC Guidelines Interpreted," 24 *DePaul L. Rev.* 127, 130 (1974).

without intention to discriminate and for a highly legitimate business reason—in fact the essential business reason—cost considerations. If this Court affirms the Third Circuit, then it will be telling employers that a practice which operates to the disadvantage of some subgroup of a larger group protected by Title VII is *per se* illegal even when undertaken for legitimate business reasons.

We submit that this Court should not affirm the Third Circuit (1) because the Third Circuit's opinion does not involve elimination of sex discrimination but instead involves the imposition of the cost of childbearing upon the employer and upon the entire employee workforce, as a matter of law, without regard to the wishes of the union or employees in respect to the manner of distributing employment benefits, (2) because affirmance would create an inequity between employers in states with public disability insurance plans such as that approved in the *Aiello* decision and employers in states which lack such a plan, and (3) because affirmance would be inconsistent with the prior decisions of this Court which have recognized cost considerations as a legitimate basis for business practices.

Employers, of necessity, cannot convey every fringe benefit possible to each group or sub-group of employees. In creating a benefits program, employers (and/or unions where there is collective bargaining) seek a balanced package of many benefits which best serve overall employee needs. In effect, since no benefits package can satisfy all wants of all employees, the parties seek to utilize the benefits dollars in the most effective manner, keeping in mind the needs of all the employees.

Disability income plans throughout the United States have consistently excluded or have strictly limited

coverage for absence due to pregnancy because of the relatively high cost of such coverage.[59] This Court has recognized that the increased cost of pregnancy coverage is a legitimate and rational basis for its exclusion. *Geduldig v. Aiello, supra,* 417 U.S. at 493-494. Private employers and unions, like the State of California in *Aiello,* also have a "legitimate interest" in distributing the available resources in such a way as to keep benefit payments at an adequate level for those disabilities that are covered, rather than to cover all disabilities inadequately.

If the decision of the Third Circuit is affirmed, employers as well as employees will be required to subsidize the decision made by a couple to have a child. Couples bearing children would, as a matter of law, receive a certain portion of the benefits package at the expense of those employees who are single, widowed, divorced, beyond the childbearing age, or who simply choose not to have children.

Affirmance of the Third Circuit's decision would also create gross inequities among employers in light of this Court's previous holding in *Geduldig v. Aiello,* 417 U.S. 484 (1974).

At least five states (including New York and California) administer disability insurance systems that pay benefits to persons in private employment who are

---

59. It has been estimated by at least one insurance actuary that the *annual* cost of adding coverage of pregnancy to short and long-term disability income plans currently in effect in the United States would be $1.35 billion. *Gilbert v. General Electric Company,* 375 F.Supp. 367, 378 (E.D. Va. 1974), *petitions for cert. before judgment filed,* 43 U.S.L.W. 3675 (U.S. June 17, 1975) (Nos. 74-1589 and 74-1590), *affirmed* ..... F.2d ..... (4th Cir., June 27, 1975).

temporarily unable to work because of disability not covered by Workmen's Compensation.[60] *Geduldig v. Aiello* held that such state systems need not include coverage for disability resulting from normal pregnancy.[61]

In California, for example, employers have the option of providing their own insurance coverage[62] or having the employees make contributions to the state for state disability plan coverage.[63]

Under *Aiello* the California state plan need not provide disability insurance for pregnancy. If this Court affirms the Third Circuit, then there will be inequities between employees covered by the state disability insurance in California, for example, and the employees in that state covered by their employer's own plan.

An even greater inequity would be created to the disadvantage of employers in the 45 states where no state disability insurance option exists.

In short, affirmance of the Third Circuit's decision would create the anomaly that certain employers will be

---

60. In addition to California (California Unemployment Insurance Code, §2601 *et seq.*) and New York (Workmen's Compensation Law, Art. IX, §200-242), Rhode Island (Rhode Island Temporary Disability Insurance Act, General Laws R.I., §28-39-1), New Jersey (Temporary Disability Benefits Law, N.J. Stat. Ann. §43:21-25) and Hawaii (Hawaii Temporary Disability Insurance Law, 4 Hawaii Rev. Stat., Title 21, Chapter 392) also administer such disability insurance systems.

61. *Geduldig v. Aiello, supra,* 417 U.S. at 497.

62. California Unemployment Insurance Code, §3251.

63. California Unemployment Insurance Code, §2901.

statutorily required to include pregnancy as a covered risk under their disability insurance programs whereas certain other employers may insure through a state disability insurance system and thus need not provide disability benefit coverage for pregnancy-related disabilities.

Even if such inequities were acceptable, there is no reason for them to exist. *Aiello* held that the exclusion of pregnancy was not sex discrimination. There is no more reason for that exclusion to be sex discrimination when the practice is that of a private insurance plan than when the exclusion is in a state insurance plan.

Moreover, by requiring employers to include childbearing costs in their disability benefits plans, this Court would be advising employers that cost considerations are irrelevant in formulating employment policies or practices. Yet, this Court has permitted the use by employers of "legitimate considerations" such as cost in formulating policies, for example, in the areas of employee selection and promotion.

In *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) and *Albemarle Paper Co. v. Moody,* 43 U.S.L.W. 4880 (U.S. June 25, 1975), this Court held that the use of a testing device which accurately measured job ability would not violate Title VII regardless of whether a disproportionate number of minority applicants for the job were thereby excluded. The permissible criterion for judging the tests in *Griggs* and *Albemarle, i.e.,* job relatedness, is essentially based upon cost considerations to the employer since the specific purpose of personnel testing is to increase the effective use of a firm's manpower.[64] Affirmance of the Third Circuit's decision,

---

64. Guion, *Personnel Testing* 3 (1965).

(footnote continued on following page)

however, would reject the use by employers of such legitimate cost considerations.

Finally, if this Court affirms the decision of the Third Circuit, this Court will be advising employers that it is *per se* a violation of Title VII to have an employment practice which operates to the disadvantage of a particular subgroup (pregnant women) of a larger group (women) protected from discrimination by that statute.

This Court refused to adopt such a far-reaching theory of employment discrimination in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973). In that case, a woman of Mexican origin and Mexican citizenship brought suit under Title VII against an employer who refused to hire her because she was not a United States citizen. Although the employment practice in *Espinoza* clearly disadvantaged persons of Mexican origin who were not United States citizens, this Court held that the employment practice did not violate Title VII because discrimination against aliens is not discrimination on the basis of national origin.[65]

By analogy, a disability income protection plan's classification on the basis of being pregnant is not classification on the basis of sex.

If this Court determines that the exclusion of pregnancy from income protection plans constitutes sex dis-

---

(footnote continued from previous page)

Almost any individual could be put on many jobs if cost were irrelevant. The unqualified performer, however, would impose additional costs to the employer from, *inter alia*, poor performance of a specific job, disruption of other employees' normal workload, added administrative costs, extraordinary training or supervisory expenses, lost production, *etc.*

65. *Espinoza, supra*, 414 U.S. at 88-89.

crimination, the logical extension of such a theory of proscribed discrimination could be far-reaching. For example, under such a theory of discrimination, the practice of giving incentive pay to an employer's factory production workforce (which contains males and females) while offering no such incentive program to the employer's office clerical workforce (which might be predominantly or exclusively female) would be illegal. Similarly, the military service credit[66] would be suspect under Title VII since many more men than women have served or are serving in the uniformed services.

Further, affirmance of the Third Circuit's decision in the instant case would imply that employers could no longer lay off employees pursuant to a "last hired, first fired" clause of a collective bargaining agreement when application of the clause would result in the lay-off of a disproportionate number of racial and ethnic minorities and/or women because a large percentage of that employer's black or female workforce have been recent hirees.[67]

---

66. Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, as amended, provides, *inter alia*, that private employers must reinstate former employees who are honorably discharged to their former positions or positions of like seniority and pay. (Section 8 of the 1940 Act was re-enacted in the Universal Military Training and Service Act of 1948 and again in the Military Selective Service Act of 1967 and is codified at 50 U.S.C.A. App. §459). For purposes of determining seniority, the returning veteran is to be treated as though he had been continuously employed during the period spent in the armed forces. *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225, 228 (1966).

67. In suits challenging such layoffs, the United States Courts of Appeals have found that the use of seniority to allocate layoffs does not violate Title VII.

(footnote continued on following page)

For all of the above reasons, this Court should reverse the decision of the United States Court of Appeals for the Third Circuit. The Court should not adopt a rule which makes it a *per se* violation of Title VII for an employer to adopt a policy which operates to the disadvantage of some subgroup of a larger group which is protected from discrimination by Title VII. This Court rejected such an approach in *Aiello*. It should reject that approach in the instant case.

(footnote continued from previous page)

E.g., Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3476 (U.S. Feb. 24, 1975) (No. 74-1064); *Jersey Central Power & Light Co. v. IBEW*, 508 F.2d 687 (3d Cir. 1975).

CONCLUSION

For the reasons set forth above, it is requested that the judgment of the Court of Appeals for the Third Circuit be reversed.

Respectfully submitted,

JOHN G. WAYMAN
SCOTT F. ZIMMERMAN
WALTER P. DEFOREST
MARTHA H. MUNSCH

REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

Counsel for *Amicus Curiae*,
Westinghouse Electric Corporation

Of Counsel:

Ronald G. Ingham
Westinghouse Electric Corporation
Gateway Center
Pittsburgh, Pennsylvania 15222

Dated: July 21, 1975

Supreme Court, U. S.
FILED
JUL 30 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF AMERICAN MUTUAL INSURANCE ALLIANCE, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AND AMERICAN INSURANCE ASSOCIATION

WILLIAM MARTIN
General Counsel
American Insurance Association
85 John Street
New York, New York 10038

PAUL C. BLUME
General Counsel
National Association of
Independent Insurers
2600 River Road
Des Plaines, Illinois 60018

RICHARD E. GOODMAN
Assistant General Counsel
American Mutual Insurance Alliance
20 North Wacker Drive
Chicago, Illinois 60606
Attorneys for Amici

Pregnancy benefits are excluded or limited in private employers' disability insurance programs because of cost and actuarial considerations. The very factors which make normal pregnancy disability an expensive risk to cover—its foreseeability, frequency, and social desirability, its voluntary character, the open-endness of its duration, and the possibility of uncontrollable claim abuse—justify the exclusion of that risk from a disability insurance program intended to provide the broadest protection possible, within reasonable premium limits, against loss of income resulting from unexpected illness or injury.

Respectfully submitted,

SIMON H. RIFKIND
MARTIN KLEINBARD
345 Park Avenue
New York, New York 10022

Attorneys for General Motors Corporation

Of Counsel:

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

FRAZER F. HILDER
EDMOND J. DILWORTH, JR.
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202

Dated: July 31, 1975

Supreme Court, U. S.
FILED
JUL 31 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY, *Petitioner*

v.

SANDRA WETZEL, AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY AS AMICUS CURIAE

CHARLES RYAN
CLARK G. REDICK
AMERICAN TELEPHONE AND TELEGRAPH COMPANY
195 Broadway
New York, New York 10017

THOMPSON POWERS
KENNETH I. JONSON
RONALD S. COOPER
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

Attorneys for the Amicus Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

12293-7-75

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. Statistics Demonstrate That the Operation of a Disability Benefits Plan Which Excludes Normal Pregnancy Does Not Discriminate Against Women	4
A. Women Receive a Disproportionate Advantage Under Existing Disability Plans Even Where Benefits for Normal Pregnancy Are Not Provided	5
B. Pregnancy Is Unique in Its Cost Impact Upon Benefits Programs	6
C. The Low Return Rate Makes Maternity Leaves Unlike Sickness and Accident Disabilities for Job-Related Purposes	8
II. This Court Has Decided That the Exclusion of Normal Pregnancy from Coverage Under a Disability Benefits Plan Does Not Constitute Discrimination on the Basis of Sex	9
A. The Court's Decision in *Aiello* Is Fully Applicable to Employer Disability Benefits Plans Under Title VII	10
B. The EEOC Guideline That Sick Leave Benefits Should Be Provided for Normal Pregnancy Should Be Rejected in This Case	17
C. The Factual Distinctions Relied Upon by the Court Below Do Not Support Its Result	20
CONCLUSION	21

TABLE OF AUTHORITIES

CASES: Page

Albemarle Paper Co. v. *Moody*, No. 74-389 (U.S., June 25, 1975) 15
Castro v. *Beecher*, 459 F.2d 725 (1st Cir. 1972) 12
Chance v. *Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972) 12
Cleveland Board of Education v. *La Fleur*, 414 U.S. 632 (1974) 7, 13
CWA v. *AT&T, Long Lines Dept., petition for cert.* filed 43 U.S.L.W. 3684 (U.S., June 24, 1975) (No. 1601) 2
CWA v. *Illinois Bell Tel. Co.*, No. 73-C-959 (N.D. Ill., filed April 13, 1973) 2
CWA v. *New York Tel. Co.*, C.A. No. 73-3352 (S.D. N.Y., filed July 31, 1973) 2
CWA v. *South Central Bell Tel. Co.*, C.A. No. 73-1771 Section A (E.D. La., filed July 5, 1973) 2
CWA v. *Southern Bell Tel. & Tel.*, No. 18328 (N.D. Ga., filed May 17, 1973) 2
CWA v. *The Pacific Tel. & Tel. Co.*, C.A. No. C-73-1739 RFP (N.D. Cal., filed September 28, 1973) 2
Espinoza v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973) 14, 18, 20
Gaston County v. *United States*, 395 U.S. 285 (1969).. 12
Geduldig v. *Aiello*, 417 U.S. 484 (1974)....3, 4, 9, 10, 11, 12, 13, 14, 16, 17, 20
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 12, 15
Jefferson v. *Hackney*, 406 U.S. 535 (1972) 16, 17
Louisiana v. *United States*, 380 U.S. 145 (1965) 12
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 12, 14, 15, 20
Milliken v. *Bradley*, 418 U.S. 717 (1974) 20, 21
Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163 (1972) 20
Newmon v. *Delta Air Lines, Inc.*, 374 F. Supp. 238 (N.D. Ga. 1973) 19
Papermakers Local 189 v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) . 12
Phillips v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) 15
Reed v. *Reed*, 404 U.S. 71 (1971) 9
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 17
U.S. v. *Chesterfield County School District*, 484 F.2d 70 (4th Cir. 1973) 12
Wetzel v. *Liberty Mutual Insurance Co.*, 511 F.2d 199 (3d Cir. 1975) 12

Page

DECISIONS OF ADMINISTRATIVE AGENCIES:

EEOC Decision No. 68-4-538E, June 16, 1969, CCH EEOC Decisions ¶ 6125 19
EEOC Decision No. 70-360, Dec. 16, 1969, CCH EEOC Decisions ¶ 6084 .....18, 19
EEOC Decision No. 71-308, Sept. 17, 1970, CCH EEOC Decisions ¶ 6170 18
EEOC Decision No. 71-562, Dec. 4, 1970, CCH EEOC Decisions ¶ 6184 18
EEOC Decision No. 71-1474, May 6, 1971, CCH EEOC Decisions ¶ 6221 19

CONSTITUTION AND STATUTES:

Fourteenth Amendment to the Constitution of the United States 3, 4, 9, 10, 12, 13
Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e *et seq.* 2, 3, 4, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20

OTHER AUTHORITIES:

29 C.F.R. § 1604.10(b) 4, 17, 18
38 Federal Register 35336 *et seq.* 4
EEOC First Annual Report to Congress (year ending June 30, 1966) 18
Brief for EEOC as *Amicus Curiae* in *Aiello* v. *Hansen*, 359 F. Supp. 792 (N.D. Cal. 1973), *reversed sub nom. Geduldig* v. *Aiello*, 417 U.S. 484 (1974)....10, 11
Memorandum of John L. Wilks, Director, OFCC, to Agency Heads (Nov. 12, 1970) 4
Opinion of EEOC General Counsel, November 15, 1966 19
Senate Report No. 92-689, p. 12 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY, *Petitioner*

v.

SANDRA WETZEL, AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE[1]

The American Telephone and Telegraph Company, together with the Associated Bell Companies (hereinafter, Bell System Companies), is the largest private employer in the nation, and almost 50 percent of its employees are women. In connection with employ-

---

[1] This brief is filed pursuant to Supreme Court Rule 42(2). Written consent of Petitioner and Respondents has been obtained and filed with the Clerk of the Court.

ment, Bell System Companies maintain disability programs which provide wage continuation benefits for employees disabled to work because of sickness or accident. All these plans, unlike the Petitioner's plan, provide benefits for disability absences resulting from pregnancy complications and abnormal pregnancies, but, like the Petitioner's plan, none provides wage continuation benefits for absences attributable to normal pregnancy and childbirth.[2]

Suits have been brought against six Bell System Companies,[3] alleging that the failure to provide sickness and accident benefits for normal pregnancy violates Title VII. In one of these cases, the Company has a petition for *certiorari* pending before the Court.[4] The resolution of the present case will have a substantial, and quite possibly a dispositive, effect on the cases pending against the Bell System Companies.

---

[2] Each Bell System Company provides periods of uncompensated leave for pregnancy and childbearing whose length is determined on a case-by-case basis. The time of beginning and ending maternity leave is basically determined by the individual employee on the advice of her doctor.

[3] *CWA* v. *AT&T, Long Lines Department, petition for cert.* filed, 43 U.S.L.W. 3684 (U.S. June 24, 1975) (No. 74-1601); *CWA* v. *Illinois Bell Tel. Co.*, No. 73-C-959 (N.D. Ill., filed April 13, 1973); *CWA* v. *Southern Bell Tel. & Tel.*, No. 18328 (N.D. Ga., filed May 17, 1973), *CWA* v. *New York Tel. Co.*, C.A. No. 73-3352 (S.D.N.Y., filed July 31, 1973); *CWA* v. *The Pacific Tel. & Tel. Co.*, C.A. No. C-73-1739 RFP (N.D. Cal., filed Sept. 28, 1973); and *CWA* v. *South Central Bell Tel. Co.*, C.A. No. 73-1771 Section A (E.D. La., filed July 5, 1973).

[4] *CWA* v. *AT&T, Long Lines Dept., supra*, n. 3.

SUMMARY OF ARGUMENT

1. The statistics submitted based on the operation of the Bell System Companies' sickness and accident benefit programs demonstrate that the provision of benefits for normal pregnancy would increase cost dramatically and would augment the disproportionate advantage women presently enjoy in disability plan benefits. Further, the data regarding the rate of return of employees following maternity leave and following disability absence, show that the two conditions are significantly different for employment-related purposes. By covering the same disabilities on the same terms and conditions for all employees, regardless of sex, an employer affords equal risk protection from its disability benefits plan to males and females alike. Title VII should not be construed to require more.

2. The decision below conflicts in principle with this Court's decision in *Geduldig* v. *Aiello*.[5] The Court there held that the Equal Protection Clause of the Fourteenth Amendment did not require California to cover absences due to normal pregnancy under a state-administered disability benefits plan. In reaching this conclusion, the Court explicitly stated that the exclusion of pregnancy did not constitute discrimination on the basis of sex, observing that "[t]here is no risk from which men are protected and women are not."[6] The decision in *Aiello* cannot be dismissed—as the court below would dismiss it—as simply one in which this Court found discrimination based on sex, but held that the discrimination passed constitutional

---

[5] 417 U.S. 484 (1974).

[6] 417 U.S. 484 at 496-497 (1974).

muster because it was justifiable under traditional Fourteenth Amendment standards. The Court went further than that in *Aiello*. It concluded in unmistakable terms that the exclusion of normal pregnancy from a disability benefits plan does not constitute sex-based discrimination—a conclusion which is as valid under Title VII as under the Fourteenth Amendment.

ARGUMENT

I. STATISTICS DEMONSTRATE THAT THE OPERATION OF A DISABILITY BENEFITS PLAN WHICH EXCLUDES NORMAL PREGNANCY DOES NOT DISCRIMINATE AGAINST WOMEN

The Bell System Companies have been concerned with the question before the Court since the promulgation of the revised EEOC Guidelines on Sex Discrimination in 1972.[7] Their concern was sharpened by the filing of the six law suits challenging their sickness and accident disability programs, and by the December, 1973 proposal by the Office of Federal Contract Compliance to revise its Sex Discrimination Guidelines.[8] As a result of these developments, the Bell System Companies undertook to review the operation of these programs and to collect and collate extensive data regarding the present treatment of men and women under such programs; the cost and benefit impact of adding coverage of normal pregnancy; and

[7] 29 C.F.R. § 1604.10(b).

[8] 38 Fed. Reg. 35336-35338. Among the changes under consideration is a provision which would require federal contractors to provide sickness and accident disability benefits for absences from work due to normal pregnancy. This would constitute a reversal of OFCC's present position that, "There is no requirement that an employee be paid during absence [for maternity leave]." Memorandum of John L. Wilks, Director, OFCC, to Agency Heads (Nov. 12, 1970) at 5.

the comparative, employment-related characteristics of maternity leaves and disability absences. The Bell System Companies responded to OFCC's request for public comments on the proposed revisions to its Sex Discrimination Guidelines by submitting a summary of pertinent data regarding the operation of their sickness and accident disability programs. These public comments, which form the basis of the following discussion, are attached as an appendix to this brief.

A. Women Receive a Disproportionate Advantage under Existing Disability Plans Even Where Benefits for Normal Pregnancy Are Not Provided

The distribution of benefits between men and women under the sickness and accident disability plans of the Bell System Companies confirms that, even without considering absences relating to normal pregnancy, women have a greater frequency rate (number of disabilities), and severity rate (duration of disabilities) than men. In fiscal years 1970-1971 and 1971-1972, women had a higher frequency of disabilities and lost more total days from work in sixteen of the seventeen disability group classifications.[9] In 1970-1971, women accounted for 64.65 percent of the total days for which benefits were paid, even though they were only 48.57 percent of the total work force eligible for benefits. Similarly, in 1971-1972, women received compensation for 63.45 percent of the total benefit days though representing only 48.29 percent of employees eligible for benefits.

[9] The one exception in both years is "Diseases of circulatory system" (Group 7), which includes heart attacks and other cardiac problems.

The seventeen disability group classifications, with the exceptions of "Complications of pregnancy, childbirth and puerperium" (Group 11), and "Perinatal morbidity and Mortality" (Group 15), contain comparable conditions, including some conditions which are unique to one sex. Thus, while prostrate trouble may be unique to males, when considered with other "Diseases of the genitourinary system" (Group 10), women have a considerably higher frequency rate and a dramatically greater number of total days lost.[10]

B. Pregnancy Is Unique in Its Cost Impact upon Benefits Programs

Calculations based on data collected by the Bell System Companies also confirm that coverage of normal pregnancy would generate a significantly greater number of total disability days than any other category of sickness or injury for men and women combined.

Based on a substantial survey, it was determined that female Bell System employees experienced approximately 21,700 pregnancies in fiscal year 1970-1971, and approximately 23,000 pregnancies in fiscal year 1971-1972. It is impossible to fix precisely the average term for which benefits would have been provided if normal pregnancy had been covered, since estimates of the period of actual disability connected with normal pregnancy range from less than six weeks to six months.[11] However, assuming an average duration of eight weeks, normal pregnancy would have accounted for 1,215,200 disability days in 1970-1971 and 1,288,000 disability days in 1971-1972. Had normal pregnancy been compensated, women, who represented 49 percent of the System's work force in 1970-1971, would have received benefits for 72 percent of the total disability days. In 1971-1972 women would have accounted for 71 percent of all benefit days though constituting only 48 percent of total employees eligible for benefits.

[10] In both 1970-71 and 1971-72, women accounted for almost six times as many lost days as men in this classification:

	Women	Men
1970-71	374,707	66,982
1971-72	391,224	71,290

[11] *See* Appendix at 6a-7a. The Court has recognized the "plethora of conflicting medical testimony," on the duration of any inability to work connected with pregnancy. *Cleveland Bd. of Educ.* v. *La Fleur,* 414 U.S. 632 (1974).

Based on these calculations, together with the average salary and seniority of eligible women, system-wide costs for disability benefits would have been increased by $15,762,663 in 1970-1971 and $19,037,330 in 1971-1972.[12] However, the impact on the present distribution of sickness and accident disability benefits would be even more dramatic. If pregnancy had been covered in both of the survey years, 5 percent of eligible women, or approximately 2.5 percent of the Companies' work force, would have accounted for approximately 21 percent of the total days for which disability benefit payments were made. No other single disability group—even including both sexes—could generate so large a number of disability days for which benefits would be paid.

[12] Pregnancy alone would have accounted for 14.47% and 13.90% of all benefits paid in the respective survey years. These estimates reflect only basic disability costs, and do not include wage-related costs such as Social Security, pensions, health insurance, etc. Moreover, the estimate is based on the assumption of an average disability period of eight weeks. Payment for the full average maternity leave period of 5½ months would have increased these costs to $32,739,007 and $39,539,070 respectively.

C. The Low Return Rate Makes Maternity Leaves Unlike Sickness and Accident Disabilities for Job-Related Purposes

Title VII does not require private employers to provide any sick leave or disability benefits, and the Bell System Companies submit that the decision to provide some form of protection against illness and injury should not obligate an employer to provide benefits for another condition which cannot properly be classified as either an illness or an injury. The Bell System Companies also submit that absences from work for pregnancy and childbirth are substantially different from absences caused by sickness or accident disabilities. Perhaps the most significant distinction for private employers, who consider disability benefits as part of an overall compensation package, is the difference in return rates for the workers in each category.

A survey of maternity leaves and absences caused by sickness and accident disabilities conducted by Illinois Bell in 1972 showed that only about 3%[13] of those who had been disabled failed to return to work while over 48 percent of employees who took maternity leave did not return following their leave. Using these figures to project costs to the System as a whole, 6.6 and 9.1 million dollars of the estimated costs of providing maternity benefits in the respective survey years, would have been paid to claimants who never returned to work. These payments would have been inconsistent with the disability programs' basic purpose of providing a bridge between periods of employment and would have constituted a unique form of severance pay.

[13] The vast majority (almost 90%) of those who did not return to work following a covered disability had either died or become eligible for a company pension.

II. THIS COURT HAS DECIDED THAT THE EXCLUSION OF NORMAL PREGNANCY FROM COVERAGE UNDER A DISABILITY BENEFITS PLAN DOES NOT CONSTITUTE DISCRIMINATION ON THE BASIS OF SEX

In *Aiello,* the Court held that the Equal Protection Clause of the Fourteenth Amendment does not require California to cover absences due to normal pregnancy under a state-administered disability benefits plan. In the course of determining that the California program did not discriminate against *any* definable group or class, the Court explicitly held that the exclusion of pregnancy does not constitute discrimination on the basis of sex, noting that "[t]here is no risk from which men are protected and women are not."[14] As the Court further stated:

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed,* 404 U.S. 71, and *Frontiero* v. *Richardson,* 411 U.S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes *one physical condition*—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, *it does not follow that every legislative classification concerning pregnancy is a sex-based classification* like those considered in *Reed, supra,* and *Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics.*
>
> * * * *
>
> The lack of identity between the excluded disability and gender as such under this insurance pro-

[14] 417 U.S. at 496-497. This holding follows the Court's previous approach that there can be no denial of equal protection unless a state has acted differently with respect to individuals or groups "similarly circumstanced." *Reed* v. *Reed,* 404 U.S. 71, 75-76 (1971).

gram becomes clear upon the most cursory analysis. *The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.*[15]

The Court in footnote 20 thus expressly held that the exclusion of pregnancy from coverage under a disability program does not constitute sex discrimination.

A. The Court's Decision in Aiello Is Fully Applicable to Employer Disability Benefits Plans under Title VII

The logic of the Court's decision in *Aiello* is fully applicable to cases involving employer disability benefits plans under Title VII. The threshold question in evaluating the exclusion of normal pregnancy from such a plan under Title VII is the same as that presented under the Equal Protection Clause in *Aiello*; does this exclusion constitute sex discrimination? Indeed, the EEOC, AT&T and other parties concerned about the application of Title VII to employer benefit plans recognized that the Court's decision in *Aiello* would have a substantial, if not controlling, effect on interpretations under Title VII involving the differing treatment of pregnancy and sickness. For this reason, many of them filed *amicus curiae* briefs in that case on the issue of whether the exclusion of absences due to normal pregnancy from a disability benefits plan constitutes sex discrimination. As the EEOC stated in its *amicus* brief to the three-judge court in *Aiello*:

> The United States Equal Employment Opportunity Commission files this brief because it believes the standards the Court should apply in

[15] 417 U.S. at 496-497 n. 20 (emphasis added).

> determining the constitutionality of § 2626 of the California Unemployment Insurance Code are similar to the standards which would be applied to the same policy if it were challenged under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-*et seq.*, as amended by the Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103 (March 24, 1972).[16]

Moreover, the dissent in *Aiello* (quoting at length from the EEOC's brief setting forth its interpretation of Title VII) asserted that the exclusion of normal pregnancy from a disability benefits plan constitutes sex discrimination, at least if a comparable and exclusively male condition is not also excluded. The majority emphatically rejected that analysis, stating that such an exclusion is not sex discrimination—

> [a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other. . . .[17]

Finding no evidence that the selection of risks covered discriminated against women in terms of their "aggregate risk protection" the majority decided that the exclusion was neither directly nor by pretext sex discrimination.

The same considerations apply in determining whether an employer discriminates on the basis of sex within the meaning of Title VII by not offering the same benefits for normal pregnancy as for accidents

[16] Brief for the EEOC as *Amicus Curiae* in *Aiello* v. *Hansen*, 359 F. Supp. 792 (N.D. Cal. 1973), *reversed sub nom. Geduldig* v. *Aiello*, 417 U.S. 484 (1974), at 1.

[17] 417 U.S. at 496-497 n.20.

and sicknesses and other temporary disabilities. The court below, on the other hand, sought to differentiate *Aiello* on the basis that "our case is one of statutory interpretation rather than one of constitutional analysis." [18] This distinction not only misses the definitional point of *Aiello,* but also is contrary to persuasive authority holding that the standards under Title VII and the Fourteenth Amendment should be the same.[19] As stated in *Chance* v. *Board of Examiners,*[20] it would be "anomalous at best" if public and private employers were held to different standards under Title VII and the Fourteenth Amendment in cases challenging allegedly discriminatory employment practices.[21]

Certainly, the argument that because only women become pregnant, a sickness plan which excludes normal pregnancy, has a "disparate effect" upon women which constitutes a *prima facie* case of sex discrimina-

---

[18] *Wetzel* v. *Liberty Mutual Ins. Co.,* 511 F.2d 199 (3d Cir. 1975).

[19] There can be no doubt that the development of equal employment opportunity law under Title VII has been significantly affected by concepts first enunciated in equal protection cases. *See e.g., Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), *citing Gaston County* v. *United States,* 395 U.S. 285 (1969) (re educational disadvantage and voting standards); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), *citing Chance* v. *Board of Examiners,* 458 F.2d 1167 (2d Cir. 1972); and *Castro* v. *Beecher,* 459 F.2d 725 (1st Cir. 1972) (both equal protection cases). *See also, Papermakers Local 189* v. *United States,* 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970), *citing, e.g., Louisiana* v. *United States,* 380 U.S. 145 (1965) (re facially neutral standards in voting registration as perpetuating past discrimination).

[20] 458 F.2d 1167, 1176 (2d Cir. 1972).

[21] *Accord, U.S.* v. *Chesterfield County School District,* 484 F.2d 70, 73 (4th Cir. 1973) (". . . the test of validity under Title VII is not different from the test of validity under the Fourteenth Amendment.").

tion ignores the holding of *Aiello* on this precise point. In answer to the same contention, the Court held that the dispositive factor is not whether an isolated condition is covered or not, but whether there is any condition which is covered for one class but not for another, *i.e.,* whether the "aggregate risk protection" derived from the plan discriminates against the complaining class.[22]

Thus, absent a showing of pretext, a case of sex discrimination is not established by proof that a benefits plan treats normal pregnancy differently from disabilities due to other causes. In this regard, the Bell System Companies note that the Court's recognition of the uniqueness of pregnancy made express in *Aiello* what was implicit in its earlier decision in *Cleveland Board of Education* v. *La Fleur.*[23] In *La Fleur,* both the maternity policies approved and those disapproved by the Court were applied by the Board to pregnant women but not to persons otherwise disabled. The Court, however, recognized the unique nature of pregnancy by resolving the Fourteenth Amendment challenge on due process grounds even though the parties and the courts below had framed the issue in terms of whether a sex-based equal protection claim had been stated.

The appropriateness of applying *Aiello* to Title VII cases is further illustrated by this Court's decisions

---

[22] 417 U.S. at 496-497:

> There is no evidence in the record that the selection of risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not. [Footnotes omitted.]

[23] 414 U.S. 632 (1974).

which hold that a Title VII violation does not exist simply because one aspect of an employer policy can be identified which affects employees of one sex, race or ethnic group differently from another. In *McDonnell Douglas Corp.* v. *Green* [24] and *Espinoza* v. *Farah Manufacturing Co.*,[25] the Court used an *Aiello*-like analysis to determine whether the practice violated Title VII. In *Espinoza,* the Court affirmed the decision of the Fifth Circuit that an employer did not discriminate on the basis of national origin simply because it refused to employ aliens. The Court acknowledged that "there may be many situations where discrimination on the basis of citizenship would have the effect of discriminating on the basis of national origin" as where citizenship is used as a pretext to disguise ethnic discrimination.[26] However, the Court found that the company's employment of persons having the same national ancestry as the plaintiff was disproportionately high in the job for which the plaintiff applied, and therefore concluded that the refusal to employ aliens was not a pretext for discrimination.[27]

A similar analysis was followed in *McDonnell Douglas.* There, the Court reversed and remanded a lower

[24] 411 U.S. 792 (1973).

[25] 414 U.S. 86 (1973).

[26] 414 U.S. at 92.

[27] *Id.* at 93. As a result of its finding, the Court declined to give significance to an EEOC Guideline declaring refusal to hire aliens to be a violation of Title VII since the Guideline's premise ". . . that discrimination on the basis of citizenship has the effect of discrimination on the basis of national origin—is not borne out." 414 U.S. at 93. For a fuller discussion of the appropriate treatment of EEOC Guidelines in such cases, *see* discussion at pp. 17-19, *infra.*

court decision which had held that an employer discriminated against a black employee by refusing to rehire him because of his involvement in a civil rights demonstration which unlawfully obstructed access to the employer's work place. While stressing that Title VII does not permit an individual's prior unlawful conduct to be used as a pretext for racial discrimination, the Court concluded that

> . . . in the absence of proof of pretextual or discriminatory application of such a reason, this cannot be thought the kind of "artificial, arbitrary, and unnecessary barriers to employment" which the Court found to be the intention of Congress to remove. [citation omitted].[28]

In these cases, the Court has called for review under Title VII of whether challenged employment practices (which are not arbitrary barriers to employment—such as non-job-related tests) are pretexts for discrimination.

A comparison of the distinction challenged in *Phillips* v. *Martin Marietta Corp.*[29] with that involved here and in *Aiello* reveals the logic of the different analytical approaches taken by the Court in applying Title VII. In *Phillips,* the employer had different hiring policies for males and females having pre-school children. Such discrimination on the basis of sex is unlawful, the Court held, at least without a showing that it was based upon factors "relevant to job performance." [30] In contrast, the disability benefits policies at

[28] 411 U.S. at 806. *Compare Griggs* v. *Duke Power Co., supra. See also Albemarle Paper Co.* v. *Moody,* No. 74-389 (U.S., June 25, 1975).

[29] 400 U.S. 542 (1971).

[30] *Id.* at 544.

issue here and in *Aiello* do not differentiate between males and females with identical conditions; it is pregnancy, not parenthood, which is unique. As the Court expressly stated in answer to the same contention in *Aiello*:

> Normal pregnancy is an objectively identifiable physical condition with unique characteristics.[31]

Furthermore, the thrust of the "disparate effect" argument is not limited to sick leave plans which exclude pregnancy. It would seem that, if that argument correctly reflects the law under Title VII, an employer might be required to institute a wage continuation plan for the full spectrum of physical disabilities if, as the Appendix to this Brief illustrates, a substantially higher percentage of females than male employees suffer such disabilities. The necessary implication of the "disparate effect" argument is that the only disabilities for which an employer can lawfully refuse to provide protection are those which the sexes, and races, and ethnic groups, experience in roughly equivalent percentages. Such a conclusion would stand Title VII on its head by requiring employers, in the name of equality, to extend benefits whenever a protected group would gain a *disproportionate* benefit from such an extension.[32]

---

[31] 417 U.S. at 496 n.20.

[32] This is exactly the dilemma which the Court has refused to create for state welfare programs. In *Jefferson* v. *Hackney*, 406 U.S. 535, 548-49 (1972), the Court rejected the same kind of "disparity" argument:

> [G]iven the heterogeneity of the Nation's population, it would only be an infrequent coincidence that the racial composition of each grant class was identical to that of the others. The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however otherwise lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment.

B. The EEOC Guideline That Sick Leave Benefits Should Be Provided for Normal Pregnancy Should Be Rejected in This Case

The court below sought to justify the result it reached by relying on EEOC Guidelines[33] to the effect that the exclusion of normal pregnancy from a disability plan constitutes sex-based discrimination in violation of Title VII. We first point out that these Guidelines were issued before this Court declared in *Aiello* that the exclusion of normal pregnancy is not sex discrimination "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other * * *."[34] Moreover, while that decision is the most definitive statement of reasons why this Court should reject the EEOC Guideline, the Guideline also lacks those attributes which might otherwise warrant this Court's deference.

> As the Court held in *Skidmore* v. *Swift & Co.*:[35]
>
> The weight of . . . [the administrative interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[36]

---

[33] 29 C.F.R. § 1604.10(b).

[34] 417 U.S. at 496-497 n.20.

[35] 323 U.S. 134 (1944).

[36] 323 U.S. at 140.

The importance of these elements was emphasized by the Court in *Espinoza* v. *Farah Manufacturing Co., supra.* The Court there noted that application of the Guideline was inconsistent with the congressionally approved policy of limiting federal employment to United States citizens, and that the then-current Guideline was inconsistent with prior interpretations of the EEOC. Although the Court stated that the EEOC's Guideline "is no doubt entitled to great deference," it concluded that "[c]ourts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong.' "[37]

Evaluation of Section 1604.10(b) in such terms reveals compelling indications that it too is wrong. For the first six years following the effective date of Title VII, EEOC consistently and publicly interpreted the Act as permitting employment practices to take into account the obvious uniqueness of pregnancy.[38] Thus, at least through 1970, the EEOC's position was that employers must grant maternity leave to pregnant employees but that such absences need not be covered as a paid leave under temporary disability plans.[39]

---

[37] 414 U.S. at 94-95.

[38] In its First Annual Report to Congress, at pages 40 and 41, the EEOC stated as follows:

> The prohibition against sex discrimination is especially difficult to apply with respect to the female employee who becomes pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. *The pregnant female, however, has no analogous male counterpart* and *pregnancy necessarily must be treated uniquely.* (Emphasis added.)

[39] *See, e.g.,* Dec. No. 71-308, Sept. 17, 1970, CCH EEOC Decisions ¶ 6170; Dec. No. 71-562, Dec. 4, 1970, CCH EEOC Decisions ¶ 6184; Dec. No. 70-360, Dec. 16, 1969, CCH EEOC Decisions ¶ 6084; Dec. No. 68-4-538E, June 16, 1969, CCH EEOC Decisions ¶ 6125.

During these years, the EEOC's approach to pregnancy continued to follow the Nov. 15, 1966 opinion of its General Counsel, which stated the Commission policy as follows:

> The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex . . . .

This view, and that advanced by this *amicus,* is consistent with the legislative history of the proposed Equal Rights Amendment:

> . . . [T]he original resolution does not require that women must be treated in all respects the same as men. Equality does not mean sameness as a result. The original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex.

S. Rep. No. 92-689, p. 12.

The Commission's published policy changed abruptly in 1971 with Decision No. 71-1474. This decision concluded that the exclusion of pregnancy from coverage under a disability benefits plan was discriminatory when all other non-occupationally related disabilities were covered. The decision did not set forth any further rationale for its conclusion or its failure to follow previous Commission policy. Following Decision No. 71-1474, there is no record of further EEOC pronouncements on this subject until the Commission published its revised Guidelines on April 4, 1972, without any accompanying evidentiary support,[40] and without affording any opportunity for public review and comment.

---

[40] As one court noted in refusing to follow the new Guideline, "There appears to be no factual basis upon which these regulations were drawn." *Newmon* v. *Delta Air Lines, Inc.,* 374 F. Supp. 238 (N.D. Ga. 1973).

C. The Factual Distinctions Relied upon by the Court Below Do Not Support Its Result

In attempting to distinguish the present case from *Aiello,* the Court of Appeals stressed the fact that Petitioner's plan, unlike California's, excludes from coverage complications of pregnancy as well as normal pregnancy. The court below seized upon this factual difference to invalidate Petitioner's plan as a whole. The Bell System Companies submit that such a result is clearly not warranted by this one difference between the Petitioner's plan here and California's plan in *Aiello.* The proper approach, rather, is to recognize that insofar as Petitioner's plan parallels that at issue in *Aiello, i.e.,* its exclusion from coverage of normal pregnancy, it is permissible under Title VII. It is only the exclusion of complications of pregnancy, which was not at issue in *Aiello,* as to which, conceivably, a different conclusion could be reached.[41] Of course, if this aspect of the plan were found to be unacceptable, the appropriate remedy under "the governing equitable principles established in this Court's decisions"[42] is not to invalidate the plan as a whole, as did the court below, but rather to enjoin only the offending portion of the practices at issue.[43]

---

[41] This practice, as any other, may be challenged on the pretext theory expressly recognized by the Court in *Aiello. See also, Espinoza* v. *Farah Mfg. Co., supra; McDonnell Douglas Corp.* v. *Green, supra.*

[42] *Milliken* v. *Bradley,* 418 U.S. 717, 757 (1974) (Stewart, J., concurring).

[43] *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 179 (1972). As Justice Stewart stated in his concurring opinion in *Millikin* v. *Bradley, supra,* "the nature of the violation determines the stage of the remedy." 418 U.S. at 757.

The importance of separating the practice of excluding complications of pregnancy from that of excluding only normal pregnancy for purposes of analysis and remedy is illustrated by the fact that the plans of many employers, including this *amicus curiae,* cover such complications. See n. 2, *supra,* and accompanying text.

CONCLUSION

For all of the foregoing reasons, the Bell System Companies urge that the decision of the Court of Appeals be reversed.

Respectfully submitted,

CHARLES RYAN
General Attorney
CLARK G. REDICK
Attorney
AMERICAN TELEPHONE AND TELEGRAPH COMPANY
195 Broadway
New York, New York 10017

THOMPSON POWERS
KENNETH I. JONSON
RONALD S. COOPER
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

Attorneys for the Amicus Curiae

APPENDIX

APPENDIX

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
2000 L STREET, NORTHWEST
WASHINGTON, D. C. 20036
202-466-5557

LEE SATTERFIELD
EXECUTIVE ASSISTANT AND ATTORNEY

January 28, 1974

Mr. Philip J. Davis
Director
Office of Federal Contract Compliance
U. S. Department of Labor
14th and Constitution Ave., N.W.
Washington, D. C. 20210

Dear Mr. Davis:

In response to your request, I am transmitting the enclosed data relevant to the proposed revisions to the Office of Federal Contract Compliance Sex Discrimination Guidelines, 38 Fed. Reg. 35336-35338 (Dec. 27, 1973), on behalf of the American Telephone and Telegraph Company and the Associated Bell Companies. This data focuses on proposed Section 60-20.3(h)(2), which provides in part:

> Medically verifiable disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are for all job-related purposes, temporary disabilities and shall be treated as such under any health or temporary disability insurance policies or sick leave plans available in connection with employment . . .

This section would reverse the present position of OFCC that, "There is no requirement that an employee be paid during absence [for maternity leave]." Memorandum of John L. Wilks, Director, OFCC, to Agency Heads, November 12, 1970, at 5.

Without regard to legal arguments against adoption of proposed Section 60-20.3(h)(2), which undoubtedly will be developed by other interested parties, the attached data statistically demonstrates: (1) the present treatment of men and women under the Companies' sickness and accident disability plan; (2) the cost and impact on the male and female share of disability benefits which would occur if normal pregnancy were treated as a sickness or accident; and (3) the fact that nearly half of those taking maternity leave do not return to work which sharply distinguishes the nature of their absence for employee benefit purposes from accident and sickness absences.

Based on this data, as well as the settled medical opinion that pregnancy is neither a sickness nor accident, we urge that OFCC *not* adopt proposed Section 60-20.3(h)(2), but maintain its present position that federal contractors need not provide sickness and accident benefits for pregnancy.

LEE SATTERFIELD
Executive Assistant
& Attorney

Bell System Data Relevant to Proposed Revisions in OFCC Sex Discrimination Guidelines Regarding Treatment of Absences Due to Normal Pregnancy

I. INTRODUCTION

Recently, six companies in the Bell System (Illinois, Southern, South Central, New York, Long Lines and Pacific) have been sued by parties attacking the legality of their sickness and accident disability programs. The crux of these charges is that the failure to treat normal pregnancy as a disability under sickness and accident disability programs, constitutes discrimination against female employees on the basis of sex. Other major employers, such as General Motors, General Electric, and Delta Air

Lines,[1] are facing similar legal challenges, and initial court decisions are now being rendered. For example, a federal district court in Atlanta recently held that Delta Air Lines could not require female employees to leave work at a specific time prior to delivery, but that absence due to pregnancy and childbirth need not be covered under an accident and sickness disability program. *Newmon* v. *Delta Air Lines, Inc.*, Civ. No. I5681 (N.D. Ga., Dec. 31, 1973). *But see, Wetzel* v. *Liberty Mutual Insurance Co.*, Civ. No. 72-169 (W.D. Pa., Jan. 9, 1974).

Since no company in the Bell System treats normal pregnancy as an accident or sickness disability, the implications of these pending cases will reach beyond the companies directly involved. Every company in the System will be affected by the results of these suits. In light of these legal challenges to current sickness and accident disability programs, it is appropriate to review the operation of the Bell System sickness and accident disability program and to estimate its current effect on employees and the effects which would result by treating pregnancy as a sickness or accident disability.

II. PRESENT DISABILITY PLANS

The sickness and accident disabilities of Bell System employees are classified, for record keeping purposes, into seventeen basic groups (see Table 1) which cover every disability recognized under the various plans within the System. For example, disabilities are grouped into infective and parasitic diseases, mental disorders, diseases of the circulatory system, the digestive system, the musculoskeletal system, and even accidents, poisonings and violence. Within each of these groups, the System's records reflect, by sex, the frequency of occurrence of each

---

[1] Grogg v. General Motors Corp., 73 Civ. No. 63 (KTD) (S.D. N.Y.); Gilbert v. General Electric Co., No. 142-72-R (E.D. Va.); Newmon v. Delta Air Lines, Inc., Civ. No. I5681 (N.D. Ga.).

group of disability, the number of disability absences, and the duration of these absences (see Tables 2 and 3).

An examination of the Bell System sickness and accident disability figures for the fiscal year 1970-71 (see Table 2), reveals that in sixteen of the seventeen disability group classifications the frequency rate of women absent from work was higher than for men; the number of cases of women disabled was higher than for men; and women lost more total days from work than men.[2] Finally, an examination of the severity rate (average duration) of these absences indicates that women were generally absent for a longer period than men. While women were 48.57% of the System's total work force eligible to receive disability payments as of December 31, 1970, a review of the System's disability statistics, including all disability groups, reveals that they received wage benefits for 64.65% of the total days for which such benefits were paid during fiscal year 1970-71. Thus, even without treating normal pregnancy as a sickness or accident disability, in fiscal year 1970-71 women collected benefits for a percentage of days far in excess of their percentage of the company work force. It should be recognized that wage replacement benefits were paid to women absent on account of complications of pregnancy and childbirth.[3]

Fiscal year 1971-72 reflects the same sort of pattern as 1970-71 (see Table 3). In the same sixteen of seventeen disability group classifications, women were absent at a higher rate than men; experienced more disabilities than men; and lost more days from work than men. Finally, the statistics again show that generally, when absent, women were absent for longer periods than men. Although

[2] The one disability group category where men are absent at a higher rate than women, experience more disabilities than women, and lose more disability days than women is diseases of the cirulatory system, which includes heart attacks and similar cardiac problems. (See Tables 2 and 3.)

[3] See classifications 11 and 15, Tables 1, 2, and 3.

women made up 48.29% of the Bell work force eligible for disability payments as of December 31, 1971, they accounted for 63.45% of the total days for which benefits were paid in all disability groups during fiscal year 1971-72. Again this disproportionate figure reflects the present operation of the Bell Companies' disability programs, which are under attack, and which do not treat normal pregnancy as a sickness or accident disability.

III. The Effect of Treating Pregnancy As A Sickness or Accident Disability

Since disability payments for pregnancies would be made only to women, treating normal pregnancy as a sickness or accident disability would mean that women employees would receive even greater benefits than the disproportionate benefits they already receive.

In late 1973, eight companies in the System performed a manual count of the number of maternity leaves that had been granted in 1972. These companies then compared this count with the total number of female employees as of December 31, 1972. The results are as follows:

Company	Number of Maternity Leaves Granted in 1972	Number of Female Employees as of December 31, 1972	Percent
New York	2,406	48,115	5.00
New Jersey	761	16,113	4.73
Chesapeake and Potomac	1,274	23,861	5.34
Ohio	732	13,321	5.50
Illinois	1,036	20,968	4.94
Northwestern	834	14,596	5.72
Southwestern	1,700	39,316	4.33
Pacific Northwest	533	9,969	5.35
Totals	9,276	186,259	4.98

By projecting the results of this eight company survey,[4] a fairly accurate estimate can be made of the System-wide effect of treating pregnancy as a sickness or accident disability.

The Bell System Companies employed approximately 434,400 women eligible for disability benefits in fiscal year 1970-71 (as of December 31, 1970). Assuming 5% of these women took maternity leave in that fiscal year, the System would have had to provide disability payments for approximately 21,700 pregnancies if maternity had been treated as a sickness and accident disability during this period. No figures have yet been compiled that accurately reflect the average length of maternity leave taken throughout the System; nevertheless, figures compiled by Illinois Bell indicate that within the Company the average maternity leave per pregnancy has been approximately 5½ months. Of course, it is reasonable to assume that most women would not be disabled for 5½ months as a result of normal pregnancy and childbirth. Indeed, the testimony of medical experts for both sides in a court action pending against General Electric (see note 1 *supra*) that is similar to the suits the Bell Companies are facing indicates that the total period of disability may be less than six weeks. However, two courts have held in a related context that eight weeks may be an appropriate estimate of the time necessarily lost from work due to pregnancy.[5] Using such an eight week period for calculations, and keeping in mind that the actual period could be found to be considerably

---

[4] The companies involved in this count have almost 40% of the System's female employees and represent a cross section of the entire Bell System. Thus, there is no reason to believe that the composite figures presented by this survey would not be valid estimates of figures for the entire System.

[5] Health v. Westerfield Board of Education, 345 F. Supp. 501 (S.D. Ohio, 1972); Doe v. Osteopathic Hospital, 3 FEP 1128 (D. Kans. 1971).

longer, or shorter,[6] if the estimated 21,700 women who took maternity leave in fiscal year 1971 had received disability benefits for eight weeks each, an additional 1,215,200 disability days would have been covered in that year. Thus, instead of receiving benefits for almost 65% of the days for which disability payments were made, women, who represented approximately 49% of the System work force eligible for benefits during this period, would have received benefits for over 72% of the days for which disability payments were made.

Similarly, if 5% of the System's fiscal year 1971-72 female work force eligible for disability benefits, approximately 461,500 women as of December 31, 1971, had received disability benefits for maternity absence in that period, a total of approximately 23,000 pregnancies would have been covered. Assuming disability payments had been made for an average of eight weeks for each of these pregnancies an additional 1,288,000 disability days would have been paid in 1971-72. Therefore, women, who represented approximately 48% of the System work force during that period, would have collected 71% of the total disability days.

---

[6] A recent example of the conceivable magnitude of payment periods occurred in Illinois. The State Fair Employment Practices Commission awarded two claimants disability payments for the full six of their maternity leaves. Elliott v. Turner Co., (Charge No. 72C-1155, December 12, 1973); Bennett v. Turner Co., (Charge No. 72C-1156, December 12, 1973). If the estimated 21,700 women who took maternity leaves in the System during fiscal year 1970-71 had received disability payments for the entire period of their 5½ month maternity leave (145 days), an additional 3,146,500 days of disability benefits would have been paid in the System. In other words, pregnant women would have received benefits due to their pregnancies for more disability days than all other women received for their non-pregnancy related disability absences; furthermore, pregnant women would have been paid for nearly twice as many disability days due to their pregnancies than were paid to men for all their disabilities!

If pregnancy had been covered during these periods as an eight week disability, 5% of the women, or approximately *2.5% of the System's work force, would have accounted for approximately 21% of the total days for which disability payments were made* in both fiscal years 1970-71 and 1971-72. No other single disability group—even including both sexes—could generate so large a number of disability days for which benefits would be paid.

These figures demonstrate that treating pregnancy as a sickness or accident disability would create a situation far different from the picture of "equality" painted by opponents of the present disability programs. Indeed, the statistics reveal that women employees already are receiving a significantly greater number of paid benefit days for disabilities than are male employees. Treating pregnancy as a sickness or accident disability would further reduce the percentage of disability days paid to male employees.

Moreover, there can be no doubt that cost of treating normal pregnancy as a sickness or accident disability would be immense. Using the previously mentioned figures which were compiled in late 1973 as the basis for projection, representative costs can readily be estimated. All employees are entitled to disability wage payments on the basis of seniority. An Illinois Bell study indicates that the average seniority of women taking maternity leave is between two and five years. Employees with 2-5 years service may receive up to full wage pay for their first week of absence as a departmental expense paid by the Company. Disability plan wage payments begin on the eighth calendar day of absence . During the first four weeks of a disability period, an employee with 2-5 years of service receives full wage pay. Subsequently, for a forty-eight week period disability payments equalling one-half the weekly salary are paid.

The average weekly wage of women with 2-5 years seniority, who were employed by the System Telephone Operating Companies in fiscal year 1970-71 as of December 31, 1970, was $111.75. If eight weeks of disability benefits had been made to pregnant employees, using the average length of Company service of those taking maternity leave during this period and the average wage of these female employees during 1970-71, the cost impact of wage continuation payments that would result from treating pregnancy as a sickness or accident disability can be estimated. Given the figures discussed above, the wage costs of treating each pregnancy as an eight week disability would have been $726.39 per pregnancy.[7] The System-wide costs for all 21,700 pregnancies in fiscal year 1970-71 would have been $15,762,663 in basic wages; in other words, approximately 2.5% of the System's work force would have received 14.4% of the basic wage benefit dollar. This does not include other wage related costs such as Social Security, pensions, health insurance, etc.[8]

The figures for fiscal year 1971-72 are comparable. The average weekly wage of female employees with 2-5 years seniority, who were employed during this period as of December 31, 1971 was $127.34. Assuming the same seniority and average disability figures applied to fiscal year 1970-71 above, the wage costs of treating each 1971-72 pregnancy as a sickness and accident disability would have been $827.71. The costs for all 23,000 pregnancies within the System during this period would have been $19,037,-

---

[7] This assumes that a pregnant employee received full wages for her first week of absence (which may be paid by the Company as a departmental expense), followed by full pay for the next four weeks' absence and half pay for the last three weeks' absence under the Company's disability plan.

[8] This also does not include the cost of establishing and administering a program to determine the length of each normal pregnancy disability and the amount of disability payments to be made for each such pregnancy.

330[9] in basic wages, not including other wage related costs. Again, had normal pregnancy been treated as a sickness and accident disability, a significant portion of the basic wage benefit dollar (13.90%) would have been concentrated in a small percentage of the work force (approximately 2.5%).

IV. Maternity Leave Return Rate

No system-wide figures indicating the precise work return rate from maternity leave and other disablities have yet been prepared; nevertheless, Illinois Bell Telephone Company recently completed such a study. The results clearly established another factor indicating the questionable equity and financial wisdom of treating pregnancy as though it were a sickness or accident disablity. The Illinois study reveals that in calendar year 1972 all but approximately 3% of those employees who were absent as a result of presently covered sickness and accident disabilities returned to work.[10] By comparison, however, during the same period more than 48% of employees who took maternity leave did not return to the Illinois Bell work force following their leave. Projecting the results of this study to the entire System, the inequity of covering pregnancy as a sickness or accident disability is manifest. If

---

[9] These figures represent an average of eight weeks disability for each pregnancy. As noted earlier, see footnote 6, this figure could be increased significantly by administrative or judicial decisions. If the entire period of an average 5½ month maternity leave were treated as a disability for purposes of the sickness and accident program, the fiscal year 1971 and 1972 costs of the Bell Companies in basic wages alone would have been $32,739,007 and $39,539,070 respectively.

[10] The vast majority (almost 90%) of employees who did not return to work after absences as a result of presently covered sickness and accident disabilities either died or became eligible for company pensions. Only 0.57% of Illinois Bell's employees actually resigned from company services after absences presently covered by the sickness and accident disability program.

the treatment of pregnancy as a sickness or accident disability would have accounted for between approximately 15.7 million dollars of basic wage benefit payments in fiscal year 1971 and 19.0 million dollars in fiscal year 1972 (assuming an eight week disability period for both fiscal years) approximately 7.6 and 9.1 million dollars of the yearly wage benefits paid in these respective fiscal years would have gone to claimants who never returned to work! These wage payments would not have served as a bridge to carry workers between periods of employment, which is the basic purpose of disability benefits, but instead would have constituted a unique form of severance pay.

V. Conclusion

The statistical evidence discussed above highlights the effects of treating pregnancy as a sickness and accident disability. An examination of this evidence raises serious doubts about the equity of so treating pregnancies. Already women receive wage benefits for days of absence as a result of sickness and accident disability that are greatly disproportionate to the wage continuation benefits which men receive. Treating pregnancy as a sickness and accident disability no matter how brief the average period of such disability, can only further distort this important benefit in favor of female employees. The cost impact of accomplishing this questionable result will be immense. Furthermore, the wage benefit payments received under this coverage, although amounting to millions of dollars, will inure to the benefit of only 5% of the Bell Companies' female employees—less than 2.5% of the work force. Finally, a look at the work return rates of employees taking maternity leave indicates that nearly half of the benefits paid for pregnancy would be paid to women who will never return to the System's work force.

Table 1

Sickness and Accident Summary Bell System

Group 01 Infective and parasitic diseases
Group 02 Neoplasms
Group 03 Endocrine, nutritional and metabolic diseases
Group 04 Diseases of blood and blood-forming organs
Group 05 Mental disorders
Group 06 Diseases of nervous system and sense organs
Group 07 Diseases of circulatory system
Group 08 Diseases of respiratory system
Group 09 Diseases of digestive system
Group 10 Diseases of genitourinary system
Group 11 Complications of pregnancy, childbirth and puerperium
Group 12 Diseases of skin and subcutaneous tissue
Group 13 Disease of musculoskeletal system and connective tissue
Group 14 Congenital anomalies
Group 15 Perinatal morbidity and mortality
Group 16 Symptoms and ill-defined conditions
Group 17 Accidents, poisonings and violence

Table 2

Total Bell System Sickness and Accident Figures for Fiscal Year 1970-71

Disability Category	Sex	No. of Cases	Frequency Rate Per 1,000 Employees	Severity Rate (average duration of illness)	Total Days Lost
01	M	2,726	5.9	26.3	71,647
	F	5,422	12.5	27.1	146,930
02	M	1,204	2.6	66.6	80,173
	F	4,991	11.5	55.6	277,647
03	M	745	1.6	38.9	28,951
	F	1,134	2.6	51.8	58,785

Disability Category	Sex	No. of Cases	Frequency Rate Per 1,000 Employees	Severity Rate (average duration of illness)	Total Days Lost
04	M	93	0.2	40.6	3,774
	F	535	1.2	36.7	19,634
05	M	1,527	3.3	57.2	87,285
	F	3,306	7.6	67.6	223,503
06	M	1,560	3.4	44.3	69,064
	F	2,592	6.0	42.1	109,132
07	M	4,637	10.1	69.4	321,773
	F	3,582	8.2	62.2	222,723
08	M	8,693	18.9	19.5	169,537
	F	18,397	42.3	19.2	353,955
09	M	5,488	11.9	38.1	208,816
	F	5,744	13.2	41.5	238,532
10	M	2,289	5.0	29.3	66,982
	F	11,137	25.6	33.6	374,707
11	M	—	—	—	—
	F	3,104	7.1	27.8	86,438
12	M	1,154	2.5	25.6	29,574
	F	1,617	3.7	28.6	46,319
13	M	3,941	8.6	46.4	182,686
	F	5,142	11.8	53.0	272,352
14	M	149	0.3	51.6	7,668
	F	304	0.7	42.2	12,822
15	M	—	—	—	—
	F	328	0.8	58.2	19,084
16	M	1,391	3.0	29.8	41,418
	F	2,909	6.7	34.6	100,758
17	M	5,694	12.4	37.4	212,981
	F	7,696	17.7	42.9	330,467

	Days Lost
Male	1,582,329
Female	2,893,788
TOTAL	4,476,117

Table 3

Total Bell System and Accident Figures for Fiscal Year 1971-72

Disability Category	Sex	No. of Cases	Frequency Rate Per 1,000 Employees	Severity Rate (average duration of illness)	Total Days Lost
01	M	2,594	5.2	30.4	78,904
	F	5,108	11.1	29.3	149,470
02	M	1,305	2.6	70.0	91,352
	F	5,390	11.7	57.6	310,518
03	M	719	1.5	45.7	32,832
	F	1,172	2.5	50.1	58,695
04	M	121	0.2	43.5	5,252
	F	462	1.0	43.9	20,281
05	M	1,568	3.2	62.4	97,893
	F	3,445	7.5	66.6	229,558
06	M	1,557	3.2	47.3	73,652
	F	2,584	5.6	44.7	115,477
07	M	5,007	10.1	73.0	365,723
	F	3,950	8.6	61.7	243,865
08	M	10,093	20.4	18.9	191,101
	F	21,789	47.2	18.7	408,365
09	M	5,699	11.5	39.4	224,655
	F	5,994	13.0	42.3	253,522
10	M	2,441	4.9	29.2	71,290
	F	11,262	24.4	34.7	391,224
11	M	—	—	—	—
	F	2,738	5.9	29.0	79,410
12	M	1,325	2.7	28.0	37,150
	F	1,627	3.5	30.1	48,936

Disability Category	Sex	No. of Cases	Frequency Rate Per 1,000 Employees	Severity Rate (average duration of illness)	Total Days Lost
13	M	4,129	8.4	49.4	203,846
	F	5,419	11.7	55.8	302,345
14	M	172	0.3	46.2	7,941
	F	339	0.7	53.5	18,119
15	M	—	—	—	—
	F	255	0.6	59.5	15,164
16	M	1,487	3.0	30.3	45,111
	F	3,103	6.7	38.0	118,036
17	M	6,597	13.3	40.0	264,127
	F	7,904	17.1	43.6	344,862

Days Lost	
Male	1,790,829
Female	3,107,847
TOTAL	4,898,676

Supreme Court, U. S.
FILED
JUL 31 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,
Defendant-Petitioner,
v.
SANDRA WETZEL and MARI ROSS, on behalf
of themselves and all others
similarly situated,
Plaintiffs-Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF PETITIONER

JOHN G. WAYMAN
SCOTT F. ZIMMERMAN
WALTER P. DEFOREST
MARTHA H. MUNSCH
REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15219
Counsel for *Amicus Curiae*,
Westinghouse Electric Corporation

Of Counsel:
RONALD G. INGHAM
Westinghouse Electric Corporation
Gateway Center
Pittsburgh, Pennsylvania 15222

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

INDEX

PAGE

Interest Of Westinghouse Electric Corporation 2

Question Presented 3

Statement Of The Case 3

Summary Of Argument 5

Argument 8

I. The Exclusion Of Maternity Benefits From Disability Income Protection Plans Is Not Discrimination Between The Sexes Because The Exclusion Does Not Classify On The Basis Of Sex 8

II. The Exclusion Of Maternity Benefits From Disability Income Protection Plans Does Not Constitute Sex Discrimination Within The Meaning Of Title VII Because Congress Did Not Intend To Outlaw The Exclusion 13

III. The 1972 Guideline Issued By The Equal Employment Opportunity Commission Concerning Disability Due To Pregnancy And Childbirth Is Not Entitled To Judicial Deference 24

A. The EEOC Exceeded The Scope Of Its Authority In Issuing The 1972 Guideline Concerning Pregnancy And Childbirth 25

B. Assuming, *Arguendo,* That The Guideline Concerning Pregnancy And Childbirth Is Interpretative In Nature, The Guideline Is Still Entitled To No Deference By This Court 28

IV. The Decision Of The Third Circuit Is Inconsistent With This Court's Prior Determinations That Cost Is A Legitimate Basis For Employer Conduct; In Addition, Affirmance Of The Third Circuit's Decision Would Have An Undesirable Effect Upon Long-Accepted Employment Practices And Well-Established Legal Principles 31

Conclusion 39

CITATIONS

CASES — PAGE

Accardi v. Pennsylvania R. Co., 383 U.S. 225 (1966) 37

Albemarle Paper Co. v. Moody, 43 U.S.L.W. 4880 (U.S. June 25, 1975) 26, 35

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 12, 13

Columbia Broadcasting System v. United States, 316 U.S. 407 (1942) 28

Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968) 25

Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973) 28, 29, 30, 36

F.H.A. v. The Darlington Inc., 358 U.S. 84 (1958) 17

Frontiero v. Richardson, 411 U.S. 677 (1973) 11, 12

Geduldig v. Aiello, 417 U.S. 484 (1974) 4, 5, 7-13, 33, 34, 35, 38

Gibson Wine Co. v. Snyder, 194 F.2d 329 (D.C. Cir. 1952) 27

Gilbert v. General Electric Company, 375 F.Supp. 367 (E.D. Va. 1974), *petitions for cert. before judgment filed,* 43 U.S.L.W. 3675 (U.S. June 17, 1975) (Nos. 74-1589 and 74-1590), *affirmed* ..... F.2d ..... (4th Cir., June 27, 1975) 33

Glidden Company v. Zdanok, 370 U.S. 530 (1962) 17

Great Northern Railway Co. v. United States, 315 U.S. 262 (1942) 17

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 35

Helvering v. Credit Alliance Corp., 316 U.S. 107 (1942) 27

Helvering v. Sabine Transportation Co., 318 U.S. 306 (1943) 27

Hou Ching Chow v. Attorney General, 362 F.Supp. 1288 (D.D.C. 1973) 27, 28

PAGE

Interstate Natural Gas Co. v. Federal Power Commission, 156 F.2d 949 (5th Cir. 1946), *affirmed,* 331 U.S. 682 (1946) 17

Jersey Central Power & Light Co. v. IBEW, 508 F.2d 687 (3d Cir. 1975) 38

Newmon v. Delta Air Lines, Inc., 374 F.Supp. 238 (N.D. Ga. 1973) 31

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) 12

Reed v. Reed, 404 U.S. 71 (1971) 11, 12

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 29

Stanton v. Stanton, 43 U.S.L.W. 4449 (U.S. April 15, 1975) 12

Udall v. Tallman, 380 U.S. 1 (1965) 30

United States v. Lincoln Rochester Trust Company, 297 F.2d 891 (2d Cir. 1962), *cert. denied,* 369 U.S. 887 (1962) 17

Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed,* 43 U.S. L.W. 3476 (U.S. Feb. 24, 1975) (No. 74-1064) 38

Weinberger v. Wiesenfeld, 43 U.S.L.W. 4393 (U.S. March 19, 1975) 12

Wetzel and Ross v. Liberty Mutual Insurance Company, 511 F.2d 199 (3d Cir. 1975) ..4, 8, 10, 13, 16, 24

Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084 (5th Cir. *en banc* 1975) 16

U. S. CONSTITUTION

Equal Rights Amendment 6, 7, 16-23, 29

Fourteenth Amendment 9, 10, 12, 19

FEDERAL STATUTES

Administrative Procedure Act, 5 U.S.C. §553 ..... 6, 27, 28, 30

Civil Rights Act of 1964, Title VII, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e, *et seq.* 2-8, 10, 11, 13-16, 23, 25, 26, 28-32, 35-38

Equal Pay Act of 1963, 29 U.S.C. §206(d)(1) 15

PAGE

Military Selective Service Act of 1967, 50 U.S.C.A. App. §459 37
Selective Training and Service Act of 1940, 54 Stat. 890, as amended 37
Universal Military Training and Service Act of 1948 37

STATE STATUTES

California Unemployment Insurance Code, §2601, *et. seq.* 34
Hawaii Temporary Disability Insurance Law, 4 Hawaii Rev. Stat., Title 21, Chapter 392 34
New Jersey Temporary Disability Benefits Law, N.J. Stat. Ann. §43:21-25 34
New York Workmen's Compensation Law, Art. IX, §200-242 34
Rhode Island Temporary Disability Insurance Act, General Laws R.I., §28-39-1 34

LEGISLATIVE HISTORY

110 Cong. Rec. 2482 (1964) 25
110 Cong. Rec. 2484-92 (1964) 13
110 Cong. Rec. 2485 (1964) 15
110 Cong. Rec. 2488 (1964) 14
110 Cong. Rec. 2490 (1964) 14
110 Cong. Rec. 2490-92 (1964) 15
110 Cong. Rec. 2491 (1964) 14
110 Cong. Rec. 2708-09 (1964) 15
110 Cong. Rec. 13168 (1964) 15
117 Cong. Rec. H9368 (daily ed. Oct. 12, 1971) 20
117 Cong. Rec. H9374 (daily ed. Oct. 12, 1971) 20
117 Cong. Rec. H9378 (daily ed. Oct. 12, 1971) 20
117 Cong. Rec. H9383 (daily ed. Oct. 12, 1971) 20
117 Cong. Rec. H9392 (daily ed. Oct. 12, 1971) 17
118 Cong. Rec. S4394 (daily ed. March 21, 1972) 20
118 Cong. Rec. S4612 (daily ed. March 22, 1972) 17
Hearings before Subcomm. 4 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. 40 (1971) 19, 20, 22, 23

PAGE

Hearings on S. J. Res. 61 before the Subcomm. on Constitutional Amendments of the Senate Judiciary Comm., 91st Cong., 2d Sess. (1970) 23
Hearings on S. J. Res. 61 and S. J. Res. 231 before the Sen. Comm. on the Judiciary, 91st Cong., 2d Sess. (1970) 21
H. R. Rep. No. 88-914, 88th Cong., 1st Sess. (1963) 25
H. R. Rep. No. 92-359, 92d Cong., 1st Sess. (1971) 18
S. Rep. No. 92-689, 92d Cong., 1st Sess. (1972) 18

MISCELLANEOUS

29 C.F.R. §800.110 15
29 C.F.R. §800.116(d) 15
29 C.F.R. §1604.10(b) 24
"Current Trends in Pregnancy Benefits—1972 EEOC Guidelines Interpreted," 24 *DePaul L. Rev.* 127 (1974) 31
EEOC General Counsel Opinion Letter, December 9, 1966 30
"The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 *Yale L. J.* 871 (1971) 20
37 Fed. Reg. 6836 (April 5, 1972) 27
Guion, *Personnel Testing* (1965) 35
U. S. Department of Labor, Bureau of Labor Statistics, Digest of 100 Selected Health Insurance Plans Under Collective Bargaining, Early 1966, Bull. No. 1502 (September 1966) 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,
Defendant-Petitioner,
v.
SANDRA WETZEL and MARI ROSS, on behalf
of themselves and all others
similarly situated,
Plaintiffs-Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF PETITIONER

This brief *amicus curiae* is filed by Westinghouse Electric Corporation (hereinafter "Westinghouse") with the consent of all parties,[1] as provided for in Rule 42 of the Rules of this Court.

1. Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

INTEREST OF WESTINGHOUSE ELECTRIC CORPORATION

Westinghouse is engaged in the manufacture of industrial electrical equipment, consumer electrical appliances, electronic equipment, electric motors, jet engines, as well as other electrical items and machinery.

Westinghouse is the defendant in various civil lawsuits presently pending in the United States District Court for the Western District of Pennsylvania in which issues have been raised which are similar to those presented in the instant case. The complaints in those suits alleged, *inter alia,* that Westinghouse has discriminated, and is discriminating, on the basis of sex by maintaining sickness and accident plans which exclude pregnancy from their disability income protection coverage, in violation of Title VII of the Civil Rights Act of 1964, as amended[2] (hereinafter "Title VII"). Plaintiffs in those cases, on behalf of a nationwide class, are seeking, *inter alia,* an injunction requiring the elimination of the pregnancy exclusion from Westinghouse's sickness and accident insurance coverage, and monetary damages for many prior years.

---

2. 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e, *et seq.*

QUESTION PRESENTED

Whether the exclusion of pregnancy from disability income protection plans violates Title VII of the Civil Rights Act of 1964, as amended.

STATEMENT OF THE CASE

Liberty Mutual Insurance Company ("Liberty Mutual") provides as a fringe benefit of employment a Sickness and Accident Income Protection Plan which provides for the payment of income during periods of absence from work resulting from non-occupational "sickness" or "accident." Those benefits are not payable for

> "disability due to pregnancy or any cause related to pregnancy, any act of declared or undeclared war, attempted suicide or intentionally self-inflicted injury, or for any disability which does not require throughout its continuance the regular attendance of a physician licensed to prescribe and administer all drugs and to perform all surgical procedures. No benefits will be paid beyond age 65."[3]

Respondents alleged in their Complaint that the denial of income protection benefits to female employees during absence from work due to pregnancy constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended.

The United States District Court for the Western District of Pennsylvania, on motion for summary judgment, held that the denial of income benefits during a woman's absence from work due to pregnancy does violate Title VII.

---

3. Liberty Mutual Insurance Company, 1970 brochure on Sickness and Accident Income Protection Plan.

The Third Circuit Court of Appeals affirmed, relying heavily upon a 1972 Sex Discrimination Guideline issued by the Equal Employment Opportunity Commission ("EEOC").[4] The Third Circuit dismissed the applicability of this Court's decision in *Geduldig v. Aiello,* 417 U.S. 484 (1974) on the grounds that *Aiello* was a case of constitutional analysis[5] and held that Liberty Mutual's income protection plan violates Title VII because it treats a protected class of persons in a disparate manner.[6]

---

4. *Wetzel and Ross v. Liberty Mutual Insurance Company,* 511 F.2d 199, 205-206 (3d Cir. 1975).

5. *Wetzel, supra,* 511 F.2d at 203.

6. *Wetzel, supra,* 511 F.2d at 206.

SUMMARY OF ARGUMENT

In *Geduldig v. Aiello,* 417 U.S. 484 (1974), this Court held that a disability insurance system which excludes pregnancy, but includes coverage for men and women who suffer from other disabilities, is not sexually discriminatory.

This Court determined in *Aiello* that the relevant classifications resulting from the exclusion of pregnancy are "pregnant women" and "non-pregnant persons," and that such classifications do not discriminate on the basis of sex.

In the instant case the Third Circuit, looking at the same classification system, held that that system discriminated on the basis of sex. The Third Circuit erroneously dismissed the *Aiello* decision on the basis that *Aiello* had involved constitutional interpretation. The Third Circuit did not explain why the *Aiello* determinations of the relevant classification system and the effect of that system upon the sexes were determinations peculiar to constitutional analysis.

The *Aiello* determinations as to the relevant classifications and also that such classifications do not discriminate on the basis of sex are legal principles which were not dependent upon deference to the California legislature and are therefore as applicable to a Title VII case as they are to an Equal Protection case.

Moreover, there is significant evidence that Congress does not intend to outlaw the exclusion of maternity benefits in disability income protection plans. Although the legislative history of Title VII's sex provisions is meager, the comments therein reveal that Congress did not take the view that the sex discrimina-

tion provisions are to be applied against every employer action which affects males and females differently. In addition, the legislative history of the proposed Equal Rights Amendment to the United States Constitution, which has been adopted by Congress, shows that Congress has explicitly disavowed the position that an employment policy or practice constitutes sex discrimination merely because it is based upon a sex-related physical characteristic.

The EEOC's 1972 Guideline concerning pregnancy and childbirth, upon which the Third Circuit heavily relied, is entitled to no judicial deference. The Guideline constitutes a substantive regulation and as such is beyond the scope of the EEOC's statutory authority to issue procedural rules. In addition, prior to adopting the 1972 Guideline, the EEOC failed to give notice or solicit comments regarding the proposed rule as required by Section 4 of the Administrative Procedure Act, 5 U.S.C. §553.

Even assuming the 1972 Guideline were a validly issued interpretative regulation, it would still be entitled to no judicial deference because it fails to meet the criteria which this Court has employed in determining the weight, if any, to be accorded administrative interpretations. The 1972 Guideline was adopted without solicitation of testimony or comments; it is inconsistent with the EEOC's prior opinions issued contemporaneously with the arrival of Title VII; and it is a judgment upon a pure question of law—a matter which is for the courts.

The Third Circuit's opinion also involves important social policy considerations which effect long-accepted employment practices and well-established legal principles. In the instant case the Court of Appeals held that

because a policy operates to the disadvantage of a particular subgroup (pregnant women), of a larger group protected from discrimination by Title VII (women), the policy is *per se* a violation of that statute. Under the Court of Appeals' decision it is irrelevant that the employer may have acted without intention to discriminate and for a highly legitimate business reason—in fact the essential business reason—cost considerations. If this Court affirmed the decision of the Third Circuit, then it would be advising employers that an employment practice which disadvantages a subgroup of a larger group protected by Title VII is *per se* illegal even though the practice is undertaken for legitimate business reasons.

Accordingly, this Court should reverse the decision of the Third Circuit because (1) the Third Circuit's decision does not involve the elimination of sex discrimination but instead involves the imposition of the cost of childbearing upon the employer and upon the entire employee workforce; (2) affirmance would create gross cost inequities between employers in states with public disability plans, such as that approved by this Court in *Aiello,* and employers in states which lack such a plan; and (3) affirmance would be inconsistent with the prior decisions of this Court which have recognized cost as a legitimate basis for employment practices.

When these policy considerations are added to the *Aiello* precedent and the strong congressional intent reflected in the legislative history of the Equal Rights Amendment, we submit that this Court should hold that the exclusion of pregnancy from a disability income protection plan is not a violation of Title VII.

ARGUMENT

I. The Exclusion Of Maternity Benefits From Disability Income Protection Plans Is Not Discrimination Between The Sexes Because The Exclusion Does Not Classify On The Basis Of Sex.

The Court of Appeals held, *inter alia,* that Liberty Mutual's disability income protection plan violates Title VII of the Civil Rights Act of 1964[7] "by excluding pregnancy benefits from coverage while including other kinds of temporary disabilities."[8] The Court below explained that although Liberty Mutual's plan is neutral on its face, it "treats a protected class of persons in a disparate manner."[9]

This determination by the Court of Appeals conflicts with prior decisions of this Court and is clearly erroneous.

This Court in the case of *Geduldig v. Aiello,* 417 U.S. 484 (1974), explicitly held that an insurance plan

---

7. Title VII provides in pertinent part as follows:

"It shall be unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex; or

(2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex."

8. *Wetzel, supra,* 511 F.2d at 207.

9. *Wetzel, supra,* 511 F.2d at 206.

which excludes pregnant women, but includes both men and women who suffer from disabilities other than those related to pregnancy and childbirth, does not discriminate on the basis of sex.

The *Aiello* case involved a challenge to the constitutionality of the disability insurance system of the State of California under which benefits were paid to persons in private employment who were temporarily unable to work because of disability not covered by workmen's compensation. The California plan excluded from coverage disabilities that were attributable to pregnancy. The District Court held that the exclusion of such disabilities violated the Equal Protection clause of the Fourteenth Amendment.

This Court reversed, holding that the "pregnancy exclusion" did not constitute sex discrimination in violation of the Equal Protection clause. This Court stated that:

> "There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.[20] There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." [Footnote 20 is that of the Court.][10]

In footnote twenty to the *Aiello* opinion this Court explained its holding that the exclusion was not sex discrimination:

---

10. *Aiello, supra,* 417 U.S. at 496-497.

> "The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes."[11]

In the instant case, the Third Circuit dismissed the applicability of *Aiello* on the grounds that *Aiello* was a case of constitutional analysis wherein deference was shown to the legislative judgment of the State of California in balancing public social welfare interests with the Constitution.[12]

It is true that a portion of the *Aiello* decision was devoted to a consideration of the significant economic costs that justified the decision of the California legislature to exclude certain disabilities related to pregnancy. However, the Third Circuit failed to recognize that the conclusion of this Court that the California plan did not involve sex discrimination was central to the Court's conclusion that the Equal Protection clause was not violated.

The Third Circuit's finding that the Liberty Mutual plan treats a protected class of persons in a disparate manner could have been reached only if (a) the Court below failed to accept the *Aiello* classifications quoted above or (b) the Court below, while accepting the *Aiello* classifications, nevertheless determined that a class of "pregnant women" may not be treated differentially under Title VII than "non-pregnant persons."

Both lines of reasoning are erroneous.

---

11. *Aiello, supra,* 417 U.S. at 497.
12. *Wetzel, supra,* 511 F.2d at 203.

First, the Third Circuit erred if it failed to apply the *Aiello* classifications. This Court's determinations in *Aiello* of the relevant classifications resulting from exclusion of pregnancy and whether or not those classifications discriminate on the basis of sex are, in themselves, legal principles which are not dependent upon any economic analysis or legislative deference. These *Aiello* principles are therefore applicable to statutory interpretation as well as constitutional analysis.

Second, assuming the Third Circuit accepted the *Aiello* classifications, it erroneously concluded that a class of pregnant women may not be treated differently from other employees. Title VII prohibits discrimination on the basis of *sex*. This Court explicitly held, in *Aiello,* that "pregnant persons" is not a sex-based classification.[13]

Our interpretation of this Court's decision in *Aiello* is consistent with prior decisions of this Court.

In *Frontiero v. Richardson*[14] and *Reed v. Reed*[15] this Court did not deal with the question of "pregnant persons." Those cases both involved discrimination

---

13. *Aiello, supra,* 417 U.S. at 496, n. 20 ("While it it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . .").
14. 411 U.S. 677 (1973).
15. 404 U.S. 71 (1971).

based upon gender, as such,[16] and were expressly distinguished on this basis in *Aiello*.[17]

Similarly, in *Phillips v. Martin Marietta Corp.*,[18] the alleged discrimination was based solely on sex in that females with pre-school age children were subject to different hiring policies than men with pre-school children. The condition on which the alleged discriminatory action was based in *Martin Marietta, i.e.*, having pre-school children, was a condition which can and does occur among both males and females.

This Court's decision in *Cleveland Board of Education v. LaFleur*,[19] which involved a mandatory leave policy for pregnant teachers, is also clearly reconcilable with *Aiello*. First, *LaFleur* did not hold that the maternity leave regulations were sexually discriminatory within the meaning of the Equal Protection Clause of the Fourteenth Amendment. Rather, this Court held that the Due Process Clause of the Fourteenth Amend-

16. *Frontiero, supra,* concerned the right of a female member of the uniformed services to claim her spouse as a "dependent" for purposes of obtaining increased quarters allowances and medical and dental benefits on an equal footing with male members. *Reed* involved the constitutionality of a mandatory provision of the Idaho probate code that gave preference to men over women when persons of the same entitlement class applied for appointment as administrator of a decedent's estate.

17. *Aiello, supra,* 417 U.S. at 496, n. 20. Distinguishable on the same basis are the recent decisions of this Court in *Stanton v. Stanton,* 43 U.S.L.W. 4449 (U.S. April 15, 1975) and *Weinberger v. Wiesenfeld,* 43 U.S.L.W. 4393 (U.S. March 19, 1975).

18. 400 U.S. 542 (1971).

19. 414 U.S. 632 (1974).

ment prohibited the state government, through the school system, from depriving a teacher of her job upon the basis of arbitrary unwarranted presumptions as to how long a pregnant person can work. Second, the restrictive maternity leave policies in *LaFleur* involved no legitimate cost variables to the employer to justify the withholding or termination of a job, whereas the conveyance of disability benefits is extremely costly.[20]

The Third Circuit's decision is inconsistent with this Court's opinion in *Aiello* and should be reversed.

II. The Exclusion of Maternity Benefits From Disability Income Protection Plans Does Not Constitute Sex Discrimination Within The Meaning of Title VII Because Congress Did Not Intend To Outlaw The Exclusion.

Contrary to the assertions of the Court of Appeals,[21] there is significant evidence that Congress does not intend to outlaw the exclusion of maternity benefits in disability income protection plans.

The legislative history of Title VII pertaining to "sex" is meager.[22] Certainly, there is nothing in that legislative history to suggest that Congress intended

20. *Brief, infra* at 33, n. 59.

21. *Wetzel, supra,* 511 F.2d at 205.

22. *Wetzel, supra,* 511 F.2d at 204.

The prohibition against sex discrimination was added as an amendment by Congressmen Smith of Virginia, probably in an attempt to defeat passage of the entire bill. The amendment was quickly adopted in the House by a vote of 168-133 after cursory debate which covers only nine pages of the Congressional Record. 110 Cong. Rec. 2484-92 (1964).

to outlaw the practice of excluding payment under sickness and accident income protection plans for absences due to pregnancy.

The debate in the House is devoid of any mention as to how biological differences between the sexes would be resolved under Title VII. Congresswoman Green expressed her dismay that problems arising out of such differences had not been considered by the Judiciary Committee prior to its voting on the measure:

> "Because of biological differences between men and women, there are different problems which will arise in regard to employment. These should be carefully considered by the Committee. There will be new problems for business, for managers, for industrial concerns. These should be taken into consideration before any vote is made in favor of the amendment without any hearings at all on the legislation.[23]

The only comments regarding so-called "fringe benefits" of employment such as the disability income protection plan involved in this case negate a finding that the exclusion of pregnancy from such plans is sexually discriminatory. For example, Congresswoman St. George emphasized that women do not want or need special privileges.[24] Congresswoman Kelly[25] stated that she agreed with her colleague, Mrs. St. George, that "fringe benefit" [sic] and the protective laws of the several states would not be destroyed by favorable

---

23. 110 Cong. Rec. 2491 (1964).
24. 110 Cong. Rec. 2488 (1964).
25. 110 Cong. Rec. 2490 (1964).

action on the amendment relating to sex discrimination.[26]

In the Senate, there was even less comment regarding sex discrimination. The legislative history in the Senate dealt essentially with an amendment offered by Senator Bennett to resolve "possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act."[27]

---

26. The remainder of the House debate consisted mostly of comments by Southern Congressmen who opposed the Civil Rights Act and included citations to material provided by female proponents of the sex discrimination amendment to the effect that women, *qua* women, were provided no protection under the civil rights bill without the amendment. Every male member of the House voicing support for the inclusion of the amendment (110 Cong. Rec. 2485, 2490-2492) ultimately voted against the civil rights bill (110 Cong. Rec. 2708-2709).

27. 110 Cong. Rec. 13168 (1964). Senator Bennett stated that the purpose of his amendment was to provide that in the event of conflicts, the Equal Pay Act, 29 U.S.C. §206(d)(1), shall not be nullified. The leadership in charge of the bill favored the Bennett Amendment and it was adopted. *Id.*

There is no implication in the Equal Pay Act legislative history that an employer is prohibited from excluding maternity benefits from disability income protection plans. To the contrary, the Secretary of Labor's regulations under the Equal Pay Act exclude "payments related to maternity" from coverage as "wages" under that Act. 29 C.F.R. §800.110. Even if employer contributions for maternity benefits were considered "wages," the Secretary of Labor's regulations specifically approve benefit plans in which equal employer contributions are provided for male and female employees, even though "the benefits which accrue to the employees in question are greater for one sex than for the other." 29 C.F.R. §800.116(d).

Congress did not make any substantive changes with respect to the sex provisions of Title VII in the March, 1972 Amendments thereto. The Third Circuit inferred that such Congressional inaction in 1972 indicates a congressional intent to apply the broad purposes of the statute to sex discrimination and to strike at all discriminatory treatment of men and women.[28] The Third Circuit's analysis of congressional intent begs the question, however, since the issue is not whether Congress intended to provide equal employment opportunity for members of both sexes but whether Congress intended that the particular employment practice in question here constitutes a sexually discriminatory employment practice.

Moreover, the legislative history of the proposed Equal Rights Amendment to the United States Constitution ("ERA")[29] indicates that the denial of maternity

---

28. *Wetzel, supra,* 511 F.2d at 204.

At least one other Court of Appeals has drawn the opposite inference from the Title VII legislative history. In *Willingham v. Macon Telegraph Publishing Co.,* 507 F.2d 1084, 1090 (5th Cir. *en banc* 1975), the Fifth Circuit *en banc* stated:

> "We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate."

29. The ERA requires that:

"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

benefits should not be regarded as discriminatory on the basis of sex.

The legislative history of the ERA constitutes credible evidence of the intent of Congress with respect to sex discrimination matters since the Amendment has been adopted by both houses of Congress.[30] This Court has held that subsequent legislation is entitled to weight in construing the intent of an earlier law dealing with the same subject. *F.H.A. v. The Darlington, Inc.,* 358 U.S. 84, 90 (1958); *Glidden Company v. Zdanok,* 370 U.S. 530, 541 (1962); *Great Northern Railway Co. v. United States,* 315 U.S. 262, 277 (1942).[31]

The legislative history of the ERA clearly shows that Congress has disavowed the position that an employment policy or practice constitutes sex discrimination merely because it is based upon a sex-related physical characteristic.

---

30. The House approved the ERA by a vote of 354-23. H. J. Res. 208, 92d Cong., 1st Sess., 117 Cong. Rec. H9392 (daily ed. Oct. 12, 1971). The Senate approved it by a vote of 84-8. S. J. Res. 122, 92d Cong., 2d Sess., 118 Cong. Rec. S4612 (daily ed. March 22, 1972). The Amendment has been submitted to the states for ratification.

31. The cases cited by Respondents in their "Brief In Opposition To The Petition For Writ Of Certiorari" (p. 12, n. 4) in support of the view that reliance upon the legislative history of the ERA is improper are clearly distinguishable. In *United States v. Lincoln Rochester Trust Company,* 297 F.2d 891 (2d Cir. 1962), *cert. denied,* 369 U.S. 887 (1962) and *Interstate Natural Gas Co. v. Federal Power Commission,* 156 F.2d 949 (5th Cir. 1946), *affirmed* 331 U.S. 682 (1947), the courts disapproved the use of legislative history relating to statutory language which had not been adopted by Congress.

Fourteen of the members of the House Committee on the Judiciary who supported the original version of H. J. Res. 208, the version of the ERA ultimately approved by both houses of Congress, stated as their Separate Views on H. J. Res. 208:[32]

> "The legal principal underlying the Equal Rights amendment as proposed by Mrs. Griffiths [Rep. Martha Griffiths of Michigan] is that the law must deal with the individual attributes of the particular person and not with stereotypes or overclassification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. 'Equality' does not mean 'sameness.' *As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example, a law providing for payment of the medical costs of child bearing could only apply to women.* In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative." [Emphasis added.]

The majority Report of the Senate Judiciary Committee characterized these "Separate Views" as stating "concisely and accurately the understanding of the proponents of the Amendment . . . ."[33]

---

32. H. R. Rep. No. 92-359, 92d Cong., 1st Sess. 7 (1971) (hereinafter cited as H. R. Rep. No. 92-359) (The Separate Views).

33. S. Rep. No. 92-689, 92d Cong., 1st Sess. 12 (1972) (hereinafter cited as S. Rep. No. 92-689). The Senate Report includes several paragraphs from the Separate Views, including the one quoted above.

These Committee Reports were based largely on testimony given at hearings by a number of key supporters of the Amendment, including Congresswoman Griffiths, the sponsor of the ERA in the House. In her testimony, Congresswoman Griffiths explained that there must necessarily be certain limits on "sex discrimination" as that concept would be treated under the Amendment. In explaining what the Amendment would *not* do, she testified:[34]

> "Like private action, governmental action dealing with a physical characteristic unique to one sex would not be affected by the equal rights amendment. Where a law deals with a physical characteristic unique to one sex, equality between the sexes could not be achieved, for such a law could not apply in practice to both sexes. Therefore, the equal rights amendment would not affect laws dealing with a physical characteristic unique to one sex, such as laws governing childbearing, sperm donation, or criminal acts capable of being committed by members of only one sex."

In response to questioning on whether the ERA would prohibit all classifications taking account of sex, Mrs. Griffiths again acknowledged the natural limitation on the scope of the Amendment:[35]

> "But you would have to have some distinction in laws that apply to mothers, to pregnant women, because men aren't pregnant. You don't have to have

---

34. Hearings before Subcomm. 4 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. 40 (1971) (hereinafter cited as ERA House Hearings).

35. ERA House Hearings at 51.

the same law applying because of different functions of the body. The bodies are not exactly the same, so there could be a difference."

Mrs. Griffiths' position was repeatedly adopted by other Congressional supporters of the ERA. Congresswoman Bella Abzug testified that the Amendment would retain sex-based distinctions "where the law could not possibly apply to both sexes, for example, as in the laws against rape."[36] Similarly, during the House debate, Congressman William Ryan pointed out:

> "The basic principle underlying the equal rights amendment is that legal rights must be determined by the actual attributes of an individual, not by sex. This principle does not preclude legitimate differentiation based on the unique physical characteristics of the sexes."[37]

This approach to the general question of what constitutes sex discrimination was endorsed by even those supporters of the ERA who claimed to prefer a broader, more "absolutist" application of the Amendment. Professor Thomas I. Emerson, Lines Professor of Law at The Yale Law School,[38] explained in testimony pre-

36. ERA House Hearings at 116.

37. 117 Cong. Rec. H9368 (daily ed. Oct. 12, 1971). To the same effect, see remarks of Congressman Drinan, *Id.* at H9374; Congressman Mitchell, *Id.* at H9378; Congressman Broyhill, *Id.* at H9383; and Senator Gurney, 118 Cong. Rec. S4394 (daily ed. March 21, 1972).

38. Professor Emerson and his co-authors were the first to articulate the "absolute" interpretation of the ERA. Brown, Emerson, Falk, and Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 *Yale L. J.* 871 (1971).

sented to both the House and Senate Committees that the Amendment would not prohibit legislation or other official action dealing with physical characteristics unique to one sex. He testified before the Senate Judiciary Committee that:

> "The fundamental legal principle underlying the equal rights amendment, then, is that the law must deal with the individual attributes of the particular person, not with a vast overclassification based upon the irrelevant factor of sex. It should be noted at this point that there is one type of situation where the law may focus on a sexual characteristic but the basic principle just stated has no application.
>
> "This occurs where the legal system deals directly with a physical characteristic that is unique to one sex. In this situation it could be said that, in a certain sense, the individual obtains a benefit or is subject to a restriction, because he or she belongs to one or the other sex.
>
> "Thus a law providing for payment of the medical costs of childbearing would cover only women, and a law relating to sperm banks would restrict only men. Such legislation cannot be said to deny equal rights to the other sex. There is no basis here for seeking or achieving equality."[39]

And in his testimony before the House Subcommittee, Professor Emerson stated:

> "[T]he equal rights amendment does not preclude legislation, or other official action, which relates to a physical characteristic unique to one sex. Thus

39. Hearings on S. J. Res. 61 and S. J. Res. 231, before the Sen. Comm. on the Judiciary, 91st Cong., 2d Sess. 298-99 (1970).

a law relating to wet nurses would cover only women, and a law regulating the donation of sperm would restrict only men. Such legislation does not, however, deny equal rights to the other sex. So long as the characteristics [sic] is found in all women and no men, or all men and no women, the law does not violate the basic principle of the equal rights amendment; for it raises no problem of ignoring individual characteristics in favor of a prevailing group characteristic or an average.

"Instances of laws directly concerned with physical differences found only in one sex are relatively rare. Yet they include many of the examples cited by opponents of the equal rights amendment as demonstrating the nonviability of that proposal. Thus not only would laws concerning wet nurses and sperm donors be permissible but so would laws establishing medical leave for child bearing, though medical leave for child rearing would have to apply to both sexes. Laws punishing forcible rape, which relate to a unique physical characteristic of man, would remain in effect. So would paternity legislation. Laws dealing with homosexual relations would likewise be unaffected, for such laws also deal with physical characteristics pertaining only to one sex."[40]

Similarly, Lucille H. Shriver, Federation Director, The National Federation of Business and Professional Women's Clubs, Inc., observed:

"The significant point always is: Is the distinction one of sex alone or, is there something added or

---

40. ERA House Hearings at 402.

some special function served. On this basis, for example, maternity legislation would not be affected by the equal rights amendment. Maternity legislation affects only females, but any man who could use it certainly would be thereby eligible. The fact is, that maternity legislation can be available only to women because they alone, physiologically, house the prenatal child and childcarrying is the criterion for maternity legislation."[41]

In view of the failure of the ERA to treat a matter such as that involved in this case as sexually discriminatory, it would be anomalous in the extreme to regard it as sex discrimination under Title VII. The legislative history of the ERA in this respect should be viewed as the controlling substitute for the comparatively barren legislative history of Title VII on sex discrimination.

In summary, the above analysis of Congress' concept of sex discrimination under both Title VII and the ERA shows that the denial of maternity benefits from a disability income protection plan should not be regarded as discriminatory on the basis of sex.

---

41. Prepared statement of Ms. Shriver presented to House Subcommittee, ERA House Hearings at 156. *Accord:* testimony of Betty Friedan, founder of National Organization for Women, Hearings on S. J. Res. 61 before the Subcomm. on Constitutional Amendments of the Senate Judiciary Comm., 91st Cong., 2d Sess. 493 (1970) ("The only full special protection that women need is in the matter of maternity and childbering [sic] and none of the so-called protective laws cover this. And furthermore, that is a functional distinction that the equal rights amendment wouldn't touch because men don't bear babies.")

III. The 1972 Guideline Issued by the Equal Employment Opportunity Commission Concerning Disability Due To Pregnancy and Childbirth Is Not Entitled To Judicial Deference.

On April 5, 1972, the Equal Employment Opportunity Commission ("EEOC") issued its revised "Guidelines on Discrimination Because of Sex" to require that health or temporary disability insurance plans cover disability due to pregnancy or childbirth on the same terms as they cover other temporary disabilities.[42]

The Court of Appeals erroneously relied on the 1972 guideline concerning pregnancy and childbirth in holding that it is sexually discriminatory for an employer to exclude pregnancy benefits from a disability income protection plan that includes other kinds of temporary disabilities.[43]

The EEOC's 1972 guideline concerning pregnancy and childbirth is entitled to no judicial deference because (1) the guideline constitutes a substantive rule which the EEOC has no statutory authority to issue and it is therefore invalid; and (2) even assuming, *arguendo,* that the guideline were an "interpretative" rather than a "substantive" rule and as such within the EEOC's rule-making power, the guideline fails to meet the criteria which this Court has employed in determining the weight, if any, to be accorded such administrative interpretations.

---

42. 29 C.F.R. §1604.10(b).

43. *Wetzel, supra,* 511 F.2d at 205-206.

A. The EEOC Exceeded The Scope Of Its Authority In Issuing The 1972 Guideline Concerning Pregnancy And Childbirth.

Section 713(a) of the Act provides that the EEOC "shall have authority from time to time to issue, amend, or rescind suitable *procedural* regulations to carry out the provisions" of Title VII.[44] The original bill as reported out of the Judiciary Committee of the House of Representatives did not contain the word "procedural."[45] The word "procedural" was inserted on the House floor pursuant to an amendment offered by Congressman Cellar[46] and was intended as a mandate to the Commission that it was not to have authority to make substantive rules and regulations.[47]

The EEOC violated this congressional mandate when it issued its 1972 guideline concerning pregnancy and childbirth. The guideline constitutes a substantive legislative rule. It affects virtually all disability and sick

---

44. 42 U.S.C. §2000e-12 (emphasis added).

45. H. R. Rep. No. 88-914, 88th Cong., 1st Sess. (1963).

46. 110 Cong. Rec. 2482 (1964). The original language was very similar to the rule-making authority of the NLRB as set forth in 29 U.S.C. §156:

> "The Board shall have authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this subchapter."

47. In *Dobbins v. Local 212, IBEW,* 292 F.Supp. 413, 449 (S.D. Ohio 1968), the Court observed:

> "We note first that the agency charged with the enforcement of Title VII, the Equal Employment Opportunity Commission, is authorized by Congress only to issue 'suitable *procedural* regulations.' That excludes substantive and the history of the adoption of the Act bears this out." (italics in original).

leave plans in effect in the United States[48] and represents a complete reversal of the prior EEOC policy and announced position.[49] More significantly, the guideline requires fundamental and drastic changes in industry insurance practices, not only by requiring the creation of a new insurance benefit but also by greatly increasing the cost of existing temporary disability insurance and sick leave plans.[50] The guideline purports to answer the ultimate legal question—whether the exclusion of pregnancy is, under Title VII, an illegal classification system—a question which Congress did not address and which the courts must answer. The guideline clearly exceeds the scope of a "procedural" regulation.[51]

---

48. Title VII covers virtually all employers, both public and private, throughout the United States and almost every such employer in the United States either excludes absence due to pregnancy from sickness and accident benefit coverage or limits such coverage more strictly than coverage for sickness or accident. *See e.g.,* U. S. Department of Labor, Bureau of Labor Statistics, Digest of 100 Selected Health Insurance Plans Under Collective Bargaining, Early 1966, Bull. No. 1502 (September 1966).

49. *Brief, infra,* at 30.

50. *Brief, infra,* at 33.

51. Compare the EEOC guideline discussed in *Albemarle Paper Co. v. Moody,* 43 U.S.L.W. 4880 (U.S. June 25, 1975) which consists of the EEOC's interpretation of specific statutory language in connection with the validation of an employer's pre-employment tests pursuant to §703(1) of Title VII. Unlike the guideline in *Albemarle,* the EEOC's 1972 guideline concerning pregnancy and childbirth is not based upon a provision in the statute. The EEOC testing guidelines were also adopted pursuant to extensive commentary and assistance from professional psychologists. No such outside testimony was sought by the EEOC on its 1972 maternity guideline. *Brief, infra,* at 31.

This Court has not hesitated in the past to invalidate administrative rules which exceeded the scope of agency authority. *Helvering v. Sabine Transportation Co.,* 318 U.S. 306, 311-312 (1943); *Helvering v. Credit Alliance Corp.,* 316 U.S. 107, 113 (1942).

The guideline concerning pregnancy and childbirth is invalid for the further reason that the EEOC failed to comply with the requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. §553, in issuing the guideline.

Section 4 requires that before an agency adopts a rule, notice must be published in the Federal Register and interested parties must be given an opportunity to comment. No such notice or opportunity to comment was given before the EEOC promulgated the 1972 guideline concerning pregnancy and childbirth.

The requirements of Section 4 apply to "substantive legislative rules and regulations" which "create law, usually implementary to an existing law." *Gibson Wine Co., Inc. v. Snyder,* 194 F.2d 329, 331 (D.C. Cir. 1952). Section 4 does not apply to an agency's "interpretative rules," which "are statements as to what the administrative officer thinks the statute or regulation means." *Gibson, supra,* at 331.

The EEOC has characterized its 1972 guideline concerning pregnancy and childbirth as "interpretative in nature."[52] This Court, however, is not bound by the label attached by the administrative agency but instead must look to such factors as the real effect of the rule, the source of authority for its promulgation, and the force and effect which attaches to the rule itself. *Hou*

---

52. 37 Fed. Reg. 6836 (April 5, 1972).

Ching Chow v. Attorney General, 362 F.Supp. 1288, 1292 (D.D.C. 1973).[53] As discussed above, the Commission's 1972 guideline attempts to create a substantive employment standard which must be met by employers. Thus, even if the EEOC had the statutory authority to issue substantive regulations, the 1972 guideline concerning pregnancy and childbirth nevertheless would be invalid because it was not issued pursuant to the requirements of the Administrative Procedure Act.

B. Assuming, *Arguendo,* That The Guideline Concerning Pregnancy And Childbirth Is Interpretative In Nature, The Guideline Is Still Entitled To No Deference By This Court.

Assuming, *arguendo,* that the EEOC's 1972 guideline concerning pregnancy and childbirth is "interpretative" rather than "substantive" in nature and that the EEOC possesses the statutory authority to issue an "interpretative" regulation, the guideline is, in any event, not entitled to judicial deference.

This Court has set forth various standards to be followed by the judiciary in determining the weight, if any, to be accorded an administrative agency's interpretation of a statutory provision.

In *Espinoza v. Farah Manufacturing Co.,* 414 U.S. 86 (1973) this Court rejected the EEOC's interpretation of the phrase "national origin" in §703 of Title VII,

53. *See also Columbia Broadcasting System, Inc. v. United States,* 316 U.S. 407, 416 (1942) ("The particular label placed upon [the commission's order] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive.")

explaining that deference to administrative guidelines must have limits where "application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question."[54]

In *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944), a case involving certain interpretative judgments issued by the Wage and Hour Administrator under the Fair Labor Standards Act, this Court noted, *inter alia,* the following criteria to be considered in evaluating an administrative regulation: the degree to which the regulation involved judgment in an area where the administrator had special expertise; its consistency with earlier and later pronouncements; and the thoroughness of the agency's consideration.

Application of the *Espinoza* and *Skidmore* criteria to the EEOC's 1972 guideline concerning pregnancy and childbirth indicates that the guideline meets none of these criteria and should therefore be accorded no deference by the Courts.

First, application of the guideline concerning pregnancy and childbirth would be inconsistent with the intent of Congress. As discussed *supra* at 13-16, there is nothing in the legislative history of Title VII to indicate that Congress intended to outlaw the practice of excluding payment under sickness and accident income protection plans for absences due to pregnancy. Moreover, when Congress re-enacted the Title VII legislation in March of 1972, the published opinions of the EEOC sanctioned the pregnancy exclusion. Also, the legislative history of the Equal Rights Amendment to the Constitution indicates that Congress does not intend that an

54. *Espinoza, supra,* 414 U.S. at 94.

employment policy or practice be held to constitute sex discrimination because it is based upon a sex-related physical characteristic such as pregnancy.[55]

Further, the subject matter of the instant guideline is not a matter as to which the EEOC has special experience or expertise. The guideline involves a question of law, *i.e.*, whether the classification of "pregnant persons" is sex discrimination. That question is for the courts not an administrative agency.

Next, the history of the issuance of the guideline in question indicates that the guideline is not entitled to the judicial deference normally accorded agency interpretations. The 1972 guideline is neither a contemporaneous nor a consistent construction of the statute.[56] Rather, the EEOC's contemporaneous position on the treatment of pregnancy under Title VII appeared in a series of opinion letters issued by the EEOC's General Counsel in 1966.[57] The EEOC's position at that time (and up to April, 1972) was that an insurance plan or other benefit plan may exclude maternity as a covered risk, and such an exclusion would not be discriminatory.

Finally, as pointed out in Part III-A, *supra,* the EEOC did not comply with the notice and comment provisions of the Administrative Procedure Act before it promul-

---

55. *Brief, supra,* at 16-23.

56. In *Udall v. Tallman,* 380 U.S. 1, 16 (1965), this Court noted that contemporaneous constructions of a statute are more likely to be given deference. In *Espinoza v. Farah Manufacturing Co.,* 414 U.S. 86 (1973) this Court found it significant that the EEOC had once held a different view as to the meaning of the phrase "national origin."

57. *E.g.,* General Counsel Opinion Letter, December 9, 1966, which was reported in CCH Employment Practice Guide, December 21, 1966 at ¶17,334.44.

gated its 1972 guideline concerning pregnancy and childbirth. No testimony, comments or opinions were solicited with respect to the guideline.[58] The issuance of the guideline in such manner reveals that the guideline was not thoroughly or objectively considered.

In summary, judged by the above standards, it is clear that the EEOC guideline concerning pregnancy and childbirth is not entitled to judicial deference.

IV. The Decision Of The Third Circuit Is Inconsistent With This Court's Prior Determinations That Cost Is A Legitimate Basis For Employer Conduct; In Addition, Affirmance Of The Third Circuit's Decision Would Have An Undesirable Effect Upon Long-Accepted Employment Practices And Well-Established Legal Principles.

The Third Circuit has held that because a policy operates to the disadvantage of a particular subgroup (pregnant women), of a larger group protected from discrimination by Title VII (women), the policy is *per se* a violation of that statute. Under the Third Circuit's holding it is irrelevant that the employer may have acted

---

58. Ms. Sonia P. Fuentes, the Chief of the Legislative Counsel Division of the EEOC at the time the Sex Discrimination Guidelines were promulgated, admitted that the EEOC had conducted no medical studies prior to issuing the guidelines, and that she was not aware of any financial studies conducted concerning the monetary impact of the guidelines on industry. The Office of Legislative Counsel drafted the guidelines, yet Ms. Fuentes had no expertise in medicine, economics, or labor relations. Deposition Testimony of Ms. Fuentes in *Newmon v. Delta Air Lines, Inc.,* 374 F.Supp. 238 (N.D. Ga. 1973). *See* "Current Trends in Pregnancy Benefits—1972 EEOC Guidelines Interpreted," 24 *DePaul L. Rev.* 127, 130 (1974).

without intention to discriminate and for a highly legitimate business reason—in fact the essential business reason—cost considerations. If this Court affirms the Third Circuit, then it will be telling employers that a practice which operates to the disadvantage of some subgroup of a larger group protected by Title VII is *per se* illegal even when undertaken for legitimate business reasons.

We submit that this Court should not affirm the Third Circuit (1) because the Third Circuit's opinion does not involve elimination of sex discrimination but instead involves the imposition of the cost of childbearing upon the employer and upon the entire employee workforce, as a matter of law, without regard to the wishes of the union or employees in respect to the manner of distributing employment benefits, (2) because affirmance would create an inequity between employers in states with public disability insurance plans such as that approved in the *Aiello* decision and employers in states which lack such a plan, and (3) because affirmance would be inconsistent with the prior decisions of this Court which have recognized cost considerations as a legitimate basis for business practices.

Employers, of necessity, cannot convey every fringe benefit possible to each group or sub-group of employees. In creating a benefits program, employers (and/or unions where there is collective bargaining) seek a balanced package of many benefits which best serve overall employee needs. In effect, since no benefits package can satisfy all wants of all employees, the parties seek to utilize the benefits dollars in the most effective manner, keeping in mind the needs of all the employees.

Disability income plans throughout the United States have consistently excluded or have strictly limited

coverage for absence due to pregnancy because of the relatively high cost of such coverage.[59] This Court has recognized that the increased cost of pregnancy coverage is a legitimate and rational basis for its exclusion. *Geduldig v. Aiello, supra,* 417 U.S. at 493-494. Private employers and unions, like the State of California in *Aiello,* also have a "legitimate interest" in distributing the available resources in such a way as to keep benefit payments at an adequate level for those disabilities that are covered, rather than to cover all disabilities inadequately.

If the decision of the Third Circuit is affirmed, employers as well as employees will be required to subsidize the decision made by a couple to have a child. Couples bearing children would, as a matter of law, receive a certain portion of the benefits package at the expense of those employees who are single, widowed, divorced, beyond the childbearing age, or who simply choose not to have children.

Affirmance of the Third Circuit's decision would also create gross inequities among employers in light of this Court's previous holding in *Geduldig v. Aiello,* 417 U.S. 484 (1974).

At least five states (including New York and California) administer disability insurance systems that pay benefits to persons in private employment who are

---

59. It has been estimated by at least one insurance actuary that the *annual* cost of adding coverage of pregnancy to short and long-term disability income plans currently in effect in the United States would be $1.35 billion. *Gilbert v. General Electric Company,* 375 F.Supp. 367, 378 (E.D. Va. 1974), *petitions for cert. before judgment filed,* 43 U.S.L.W. 3675 (U.S. June 17, 1975) (Nos. 74-1589 and 74-1590), *affirmed* ..... F.2d ..... (4th Cir., June 27, 1975).

temporarily unable to work because of disability not covered by Workmen's Compensation.[60] *Geduldig v. Aiello* held that such state systems need not include coverage for disability resulting from normal pregnancy.[61]

In California, for example, employers have the option of providing their own insurance coverage[62] or having the employees make contributions to the state for state disability plan coverage.[63]

Under *Aiello* the California state plan need not provide disability insurance for pregnancy. If this Court affirms the Third Circuit, then there will be inequities between employees covered by the state disability insurance in California, for example, and the employees in that state covered by their employer's own plan.

An even greater inequity would be created to the disadvantage of employers in the 45 states where no state disability insurance option exists.

In short, affirmance of the Third Circuit's decision would create the anomaly that certain employers will be

---

60. In addition to California (California Unemployment Insurance Code, §2601 *et seq.*) and New York (Workmen's Compensation Law, Art. IX, §200-242), Rhode Island (Rhode Island Temporary Disability Insurance Act, General Laws R.I., §28-39-1), New Jersey (Temporary Disability Benefits Law, N.J. Stat. Ann. §43:21-25) and Hawaii (Hawaii Temporary Disability Insurance Law, 4 Hawaii Rev. Stat., Title 21, Chapter 392) also administer such disability insurance systems.

61. *Geduldig v. Aiello, supra,* 417 U.S. at 497.

62. California Unemployment Insurance Code, §3251.

63. California Unemployment Insurance Code, §2901.

statutorily required to include pregnancy as a covered risk under their disability insurance programs whereas certain other employers may insure through a state disability insurance system and thus need not provide disability benefit coverage for pregnancy-related disabilities.

Even if such inequities were acceptable, there is no reason for them to exist. *Aiello* held that the exclusion of pregnancy was not sex discrimination. There is no more reason for that exclusion to be sex discrimination when the practice is that of a private insurance plan than when the exclusion is in a state insurance plan.

Moreover, by requiring employers to include childbearing costs in their disability benefits plans, this Court would be advising employers that cost considerations are irrelevant in formulating employment policies or practices. Yet, this Court has permitted the use by employers of "legitimate considerations" such as cost in formulating policies, for example, in the areas of employee selection and promotion.

In *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) and *Albemarle Paper Co. v. Moody,* 43 U.S.L.W. 4880 (U.S. June 25, 1975), this Court held that the use of a testing device which accurately measured job ability would not violate Title VII regardless of whether a disproportionate number of minority applicants for the job were thereby excluded. The permissible criterion for judging the tests in *Griggs* and *Albemarle, i.e.,* job relatedness, is essentially based upon cost considerations to the employer since the specific purpose of personnel testing is to increase the effective use of a firm's manpower.[64] Affirmance of the Third Circuit's decision,

---

64. Guion, *Personnel Testing* 3 (1965).

(footnote continued on following page)

however, would reject the use by employers of such legitimate cost considerations.

Finally, if this Court affirms the decision of the Third Circuit, this Court will be advising employers that it is *per se* a violation of Title VII to have an employment practice which operates to the disadvantage of a particular subgroup (pregnant women) of a larger group (women) protected from discrimination by that statute.

This Court refused to adopt such a far-reaching theory of employment discrimination in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973). In that case, a woman of Mexican origin and Mexican citizenship brought suit under Title VII against an employer who refused to hire her because she was not a United States citizen. Although the employment practice in *Espinoza* clearly disadvantaged persons of Mexican origin who were not United States citizens, this Court held that the employment practice did not violate Title VII because discrimination against aliens is not discrimination on the basis of national origin.[65]

By analogy, a disability income protection plan's classification on the basis of being pregnant is not classification on the basis of sex.

If this Court determines that the exclusion of pregnancy from income protection plans constitutes sex dis-

---

(footnote continued from previous page)

Almost any individual could be put on many jobs if cost were irrelevant. The unqualified performer, however, would impose additional costs to the employer from, *inter alia,* poor performance of a specific job, disruption of other employees' normal workload, added administrative costs, extraordinary training or supervisory expenses, lost production, *etc.*

65. *Espinoza, supra,* 414 U.S. at 88-89.

crimination, the logical extension of such a theory of proscribed discrimination could be far-reaching. For example, under such a theory of discrimination, the practice of giving incentive pay to an employer's factory production workforce (which contains males and females) while offering no such incentive program to the employer's office clerical workforce (which might be predominantly or exclusively female) would be illegal. Similarly, the military service credit[66] would be suspect under Title VII since many more men than women have served or are serving in the uniformed services.

Further, affirmance of the Third Circuit's decision in the instant case would imply that employers could no longer lay off employees pursuant to a "last hired, first fired" clause of a collective bargaining agreement when application of the clause would result in the lay-off of a disproportionate number of racial and ethnic minorities and/or women because a large percentage of that employer's black or female workforce have been recent hirees.[67]

---

66. Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, as amended, provides, *inter alia,* that private employers must reinstate former employees who are honorably discharged to their former positions or positions of like seniority and pay. (Section 8 of the 1940 Act was re-enacted in the Universal Military Training and Service Act of 1948 and again in the Military Selective Service Act of 1967 and is codified at 50 U.S.C.A. App. §459). For purposes of determining seniority, the returning veteran is to be treated as though he had been continuously employed during the period spent in the armed forces. *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225, 228 (1966).

67. In suits challenging such layoffs, the United States Courts of Appeals have found that the use of seniority to allocate layoffs does not violate Title VII.

(footnote continued on following page)

For all of the above reasons, this Court should reverse the decision of the United States Court of Appeals for the Third Circuit. The Court should not adopt a rule which makes it a *per se* violation of Title VII for an employer to adopt a policy which operates to the disadvantage of some subgroup of a larger group which is protected from discrimination by Title VII. This Court rejected such an approach in *Aiello*. It should reject that approach in the instant case.

(footnote continued from previous page)

E.g., Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed,* 43 U.S.L.W. 3476 (U.S. Feb. 24, 1975) (No. 74-1064); *Jersey Central Power & Light Co. v. IBEW,* 508 F.2d 687 (3d Cir. 1975).

CONCLUSION

For the reasons set forth above, it is requested that the judgment of the Court of Appeals for the Third Circuit be reversed.

Respectfully submitted,

JOHN G. WAYMAN
SCOTT F. ZIMMERMAN
WALTER P. DEFOREST
MARTHA H. MUNSCH

REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

Counsel for *Amicus Curiae,*
Westinghouse Electric Corporation

Of Counsel:

Ronald G. Ingham
Westinghouse Electric Corporation
Gateway Center
Pittsburgh, Pennsylvania 15222

Dated: July 21, 1975

Supreme Court, U. S.
FILED
JUL 30 1975
MICHAEL RODAK, JR. CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF AMERICAN MUTUAL INSURANCE ALLIANCE, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AND AMERICAN INSURANCE ASSOCIATION

WILLIAM MARTIN
General Counsel
American Insurance Association
85 John Street
New York, New York 10038

PAUL C. BLUME
General Counsel
National Association of
Independent Insurers
2600 River Road
Des Plaines, Illinois 60018

RICHARD E. GOODMAN
Assistant General Counsel
American Mutual Insurance Alliance
20 North Wacker Drive
Chicago, Illinois 60606
Attorneys for Amici

Gunthorp-Warren Printing Company, Chicago • 346-1717

INDEX.

PAGE

Interest of the Amici Curiae 1

Argument 3

Conclusion 9

AUTHORITIES CITED.

Cases.

Aiello v. *Hansen*, 359 F. Supp. 792 (N. D. Cal., 1973) .. 3

Geduldig v. *Aiello*, 417 U. S. 484 (1974) 3, 4, 6, 9

Gilbert v. *General Electric Company*, No. 74-1557, June 27, 1975, *pet. for cert. pend.*, Nos. 74-1589 and 74-1590 3

Statutes and Regulations.

29 C. F. R. 860.120 7

4 Hawaii Rev. Stat., Title 21, Sections 392-3 4

Miscellaneous.

Address by Thomas J. Gilooly: "The Developing Issue of Sex Discrimination in Insurance—An Overview", The Association of Life Insurance Counsel, May 6, 1974 .. 4

Brief for American Telephone and Telegraph Company as Amicus Curiae, *Geduldig* v. *Aiello*, 417 U. S. 484 (1974) 4-5

Brief for Appellant, *Geduldig* v. *Aiello*, 417 U. S. 484 (1974) 6

Brief for General Electric Co. as Amicus Curiae, *Geduldig* v. *Aiello*, 417 U. S. 484 (1974) 4-5

Comment, *Developments*—Title VII, 84 Harv. L. Rev. 1109 (1971) 8

Koontz, *Childbirth and Child Rearing Leave: Job Related Benefits*, 17 N. Y. L. F. 480 (1971) 6

Report of the Proceedings of the Hearings on the "Economic Problems of Women" before the Joint Economic Committee of Congress, vol. 3 (July 12, 1973) 4

Source Book of Health Insurance Data, 1973-1974 (Health Insurance Institute) 6

U. S. Dept. of H. E. W., *Vital and Health Statistics Series*
"Current Estimates—1971", (Series 10, No. 79) .. 5-6
"Current Estimates—1972", (Series 10, No. 85) .. 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF AMERICAN MUTUAL INSURANCE ALLIANCE, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AND AMERICAN INSURANCE ASSOCIATION

INTEREST OF THE AMICI CURIAE[1]

The membership of the American Mutual Insurance Alliance, National Association of Independent Insurers and American Insurance Association (hereafter the "Associations") constitute most of the property and casualty insurers in the United States.[2]

1. Pursuant to Supreme Court Rule 42(2), this brief is being filed with written consents from all parties.

2. Liberty Mutual Insurance Company is a member of the American Mutual Insurance Alliance, but is not a member of the National

The American Insurance Association has approximately 140 member companies, the National Association of Independent Insurers approximately 400 member companies and the American Mutual Insurance Alliance approximately 100 member companies, all of whom are property and casualty insurers. Because the Associations, therefore, have considerable experience with insurance coverage, they are desirous of presenting their views. The Associations' presentation, rather than duplicate the arguments advanced by the Petitioner, will address the insurance concepts which they believe relevant to the issue at bar.

Association of Independent Insurers or the American Insurance Association.

ARGUMENT

The California disability income system that was before this Court in *Geduldig* v. *Aiello,* 417 U. S. 484 (1974), functioned in the same manner as a private disability insurance policy. It was predicated on a desire to provide a broad illness and injury program within the limited financial resources available. Given this objective, since pregnancy disability coverage is, as this Court recognized in *Aiello,* "extraordinarily expensive" (417 U. S. at 493), it is a risk that cannot be included without inequitably distorting the benefits available to the insured group. The majority of non-pregnant persons, both male and female, would have to subsidize a sub-group consisting of pregnant women. The addition of the risk of pregnancy would, "in the name of equity, create an even greater program imbalance in favor of women over men." *Aiello* v. *Hansen,* 359 F. Supp. 792, 802 (N. D. Cal. 1973) (dissent of Williams, D. J.), *rev'd, Geduldig* v. *Aiello, supra.*[3] This result, it is submitted, would be contrary to the objective of Title VII: to provide equality rather than to create an advantage or provide compensatory relief for either sex. Equality in this case must be measured in terms of relative cost and aggregate risk coverage. Under these tests, Liberty's pregnancy exclusion cannot be found to be discriminatory *per se* or to be based on a "pretext designed to effect an invidious discrimination." *Aiello,* 417 U. S. at 496-497, n. 20.

The Liberty plan provides for equal premiums on behalf of all employees without regard to gender. All employees are also

3. Title VII only ". . . seeks to equalize opportunity, not create an advantage for either men and women. If Congress wishes to legislate in favor or pregnant women [it may] . . . ." *Gilbert* v. *General Electric Company,* ..... F. 2d ....., No. 74-1557 (4th Cir. June 27, 1975), *pet. for cert. pend.,* Nos. 74-1589 and 74-1590 (dissenting opinion of Widener, C. J.).

provided with equal coverage "in terms of aggregate risk protection . . . there is no risk from which men are protected and women are not [or vice-versa]." *Aiello,* 417 U. S. at 496-497. Nor can there be any assertion that plan benefits are distributed disproportionately. Indeed, one of the insurance's industry most out-spoken critics, Herbert S. Denenberg, former Commissioner of Insurance for the State of Pennsylvania, admitted in this testimony to Congress that:

> Disability coverage poses the most difficult problem [to unisex rates] as the loss experience of women, *even with pregnancy costs excluded,* may run two and a half times higher than costs for men.[4]

Viewed in terms of overall cost this means that:

> Assuming that women comprise 38% to 40% of the work force under a typical disability income plan, the cost for the benefit [covering pregnancy] would amount to about a 40% to 50% increase in the employer's current cost.[5]

In actual experience this has been the result. In 1973 the Hawaii Temporary Disability Insurance Law was amended to include pregnancy and the termination of pregnancy under the definition of "disability".[6] As a result, the Equitable Life Assurance Society of the United States was required to adjust its rates for private plans certified by the State. While the premium rate for male employees remained at $3.24 per month, the rate for female employees, which, at $4.00 per month, was already 23% higher than the male rate, was increased another 119% to $8.76 per female employee.[7] Using this example, and assuming that an employer has 40% female employees, the inclusion of the risk of pregnancy would increase the employer's overall cost 53%.[8] If the employee complement was 50% female, the increased cost would be 65%. Stated differently, the foregoing representative figures illustrate that one of every three dollars in premiums would be paid to cover pregnancy and over two of every three dollars would be paid to cover females as a group.

One need not rely, however, solely on increased premium costs calculated by private insurers to demonstrate that, even without pregnancy coverage, females normally receive an advantage under most disability income plans. Statistics which substantiate this conclusion are available from public authorities. According to the United States Department of Health, Education and Welfare, the incidence of acute conditions, days of restricted activity and days of disability all indicate that females are consistently more vulnerable.[9] Examining the experience of

4. Report of the Proceedings of the Hearings on the "Economic Problems of Women" before the Joint Economic Committee of Congress, Vol. 3 (July 12, 1973), p. 198 (emphasis added).

5. Thomas J. Gillooly, Associate General Counsel, Health Insurance Association of America, "The Developing Issue of Sex Discrimination in Insurance—An Overview", paper presented to The Association of Life Insurance Counsel, on May 6, 1974 at White Sulphur Springs, West Virginia.

6. 4 Hawaii Rev. Stat., Title 21, Sections 392-3.

7. These figures are fully corroborated by the experience of General Electric Co. and American Telephone and Telegraph Company presented to this Court in their briefs *amicus curiae* in *Geduldig* v. *Aiello, supra.*

8. Assuming women comprise 40% of a work force, the calculation would be:

(1) (40%) ($8.76) + (60%) ($3.25) = 5.45
(2) (40%) ($4.00) + (60%) ($3.25) = 3.55
(3) 5.45 − 3.55 = 1.90
(4) 1.90 − 3.55 = 53.5%

9.

1971—Incidence of Acute Conditions Per 100 Persons Per Year by Age

	Averages	17-44 Years	45 Years & Older
Males	207.8	185.1	107.2
Females	228.5	225.5	135.6

With regard to days of restricted activity, days of bed disability and days lost from work, the result is the same.

1971—Days of Restricted Activity Per 100 Persons Per Year by Age

	All Ages	17-44 Years	45 Years & Older
Males	792.9	714.1	673.7
Females	965.0	923.4	980.4

the State of Rhode Island, which attempted to include pregnancy within the definition of "disability" in a state plan in 1943, the results are startling. By 1949-1950 "the pregnancy claims constituted 22.62 per cent of all claims[10] and 30.4 per cent of all benefits paid [almost one of every three dollars]."[11] The severe drain on benefit dollars had to be curtailed through strict limits on pregnancy claims. The estimates and experience of other states with disability income programs further confirms the actuarial necessity of either wholly excluding the risk of pregnancy from coverage, or, at least, placing strict limits on the payment of benefits for pregnancy-related causes.[12]

Days of Bed Disability Per 100 Persons Per Year by Age

	All Ages	17-44 Years	45 Years & Older
Males	339.3	297.2	270.3
Females	431.0	429.3	339.2

Days Lost From Work Associated Per 100 Currently Employed Persons Per Year by Age

	All Ages	17-44 Years	45 Years & Older
Males	315.0	331.3	289.7
Females	378.0	395.4	350.1

U. S. Dept. of H. E. W., *Vital and Health Statistics Series*, "Current Estimates—1971" (Series 10, No. 79), Tables 2, 5, and 6. To the same effect, see the same publication for the year 1972 (Series 10, No. 85), Tables 2, 5, 6 and 8; and the *Source Book of Health Insurance Data 1973-1974* (Health Insurance Institute).

10. Liberty's evidence indicated that if pregnancy had been a covered risk in recent years under its policy claims would have risen 25-26%. See Joint Appendix, p. 190.

11. See Koontz, *Childbirth and Child Rearing Leave: Job Related Benefits*, 17 N. Y. L. F. 480, 485 (1971).

12. In New York, the State estimates that the inclusion of the risk of pregnancy in its disability coverage would result in an additional $100 million dollars in benefits or a 35 percent increase. Since the statutory amendment in Hawaii (see text at n. 6, *supra*), 33% of the claims have been related to pregnancy. See letters of April 19, 1974 and April 11, 1974 from the Attorney Generals of California and New Jersey filed with this Court in *Geduldig* v. *Aiello, supra.* Including the risk of pregnancy, California estimated that while a man would average receipt of $.80 in benefits for every dollar he paid in contributions, an average woman would receive $2.33 for each dollar paid in contributions—a 250 to 300 percent disparity. See Appellant's brief in *Geduldig* v. *Aiello, supra*, p. 26.

The necessity of utilizing such cost and actuarial principles to determine the propriety of decisions involving insurance coverage becomes apparent when an attempt is made to construct standards by which insurance policies can be measured. Surely, an employer (1) whose disability insurance coverage is limited to the primary "acute conditions" as defined by H. E. W.—respiratory conditions, parasitic and infective diseases, and digestive system conditions and injuries, (2) who pays equal premiums on behalf of males and females, and (3) whose female and male groups of employees receive proportional shares of the benefits paid out cannot be said to have violated Title VII simply by excluding the risk of pregnancy from its coverage. The question then becomes, what factor is different for the employer, like Liberty Mutual, whose insurance covers a wide range of risks but not pregnancy? If, as in Liberty Mutual's policy, the premiums are equal, the "aggregate risk" coverage is equal, and there is no claim that the distribution of benefits to males and females is dissimilar, the Associations submit that there is no distinction. Either both employers have violated Title VII or neither have. Like age[13] and prior health history, pregnancy provides a legitimate basis for the exclusion of certain

13. Under the Age Discrimination Act, the Department of Labor states (29 C. F. R. 860.120):

> A retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive lesser . . . benefits. . . .

risks.[14] The significant factor is not that pregnancy is unique to females but that pregnancy disabilities are unique from an insurers' perspective in terms of cost and risk.

14. As one commentator noted with respect to an equivalent actuarial situation, the dissimilar life expectancies of each sex does not mean "that an individual woman employee can . . . claim a higher lump sum death benefit as a term of employment on the ground that women in general live longer than men in general." The commentator further observed:

> Life expectancy is a characteristic that is not related, in the normal sense, to job capability. Being branded as a member of a sex with a greater life expectancy is not quire the same as being the victim of a debilitating stereotype, such as the case with driver safety. Moreover, requiring employers to make unequal contributions on the basis of sex may create a wage cost incentive to them to hire those employees whose sex means lower premium contributions.
>
> Given the monolithic structure of the insurance industry in this regard, and the almost universal desirability of life insurance, most employees without a group policy would purchase life insurance on their own if money were provided by the employer, and in the process would face sex discrimination. Thus, when the employer merely consolidates the process, and effects a savings available through group coverage, the sex discrimination seems more a fact of life than an invidious discrimination.

Comment, *Developments—Title VII*, 84 Harv. L. Rev. 1109, 1174-5 (1971).

CONCLUSION

The proper application of sound actuarial principles in molding an insurance benefit package provides the best method of making non-discriminatory benefit coverage decisions. These principles prevent inequitable subsidization of one group to the detriment of others allowing "[t]he fiscal and actuarial benefits of the program [to] accrue" (*Aiello*, 417 U. S. 497, n. 20) to all employees equally and distributing equitably the premium savings inherent in group coverage. The Associations respectfully submit that the failure of the lower courts to appreciate these principles has led to an erroneous decision which must be reversed.

Respectfully submitted,

WILLIAM MARTIN
General Counsel
American Insurance Association
85 John Street
New York, New York 10038

PAUL C. BLUME
General Counsel
National Association of
Independent Insurers
2600 River Road
Des Plaines, Illinois 60018

RICHARD E. GOODMAN
Assistant General Counsel
American Mutual Insurance Alliance
20 North Wacker Drive
Chicago, Illinois 60606
Attorneys for Amici

Supreme Court, U. S.
FILED
JUL 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A Corporation,

Petitioner,

—v.—

SANDRA WETZEL and MAIN ROSE, on Behalf of Themselves and All Others Similarly Situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN LIFE INSURANCE ASSOCIATION AND HEALTH INSURANCE ASSOCIATION OF AMERICA ON BEHALF OF PETITIONER

EDWARD SILVER
LARRY M. LAVINSKY
STEPHEN R. THIMAN
SARA S. PORTNOY
300 Park Avenue
New York, New York 10022
Attorneys for the Amici

Of Counsel:

PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022

KENNETH L. KIMBLE
General Counsel
American Life Insurance Association
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

THOMAS J. GILLOOLY
Associate General Counsel
Health Insurance Association of America
750 Third Avenue
New York, New York 10017

INDEX

PAGE

Authorities Cited ii

Interest of the Amici 1

The Decision Below 2

Summary of Argument 4

ARGUMENT:

Omission of Disability Benefits on Account of Pregnancy Does Not Constitute Discrimination on Account of Sex 6

The EEOC Guidelines Here at Issue Should Be Rejected by This Court 11

A. The Guidelines Lack Those Features Which Induce Courts to Accord Deference to Administrative Interpretations 12

B. The Guidelines Are Inconsistent With the Legislative History of Title VII and Other Indicators of Legislative Intent 18

1. Legislative History 18

2. Contemporaneous Practices and Interpretations 20

3. The Known Cost Magnitude and Congressional Silence 23

PAGE

The Challenged Practices Do Not Constitute Discrimination on Account of Sex Under the Rationale of *Griggs* v. *Duke Power Co.* 25

Payment of Disability Benefits on Account of Normal Pregnancy Does Not Further the Purposes of Temporary Disability Coverage 29

CONCLUSION 33

AUTHORITIES CITED

Cases:

American Federation of Musicians v. *Wittstein*, 379 U.S. 171 (1964) 22

Brennan v. *General Telephone Co.*, 488 F.2d 157 (5th Cir. 1973) 12

Cleveland Board of Education v. *LaFleur*, 414 U.S. 632 (1974) 7, 10

Cohen v. *Chesterfield County School Board*, 474 F.2d 395 (4th Cir. 1973), *rev'd on other grounds sub nom. Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974) 10

Communications Workers of America v. *American Telephone & Telegraph Co., Long Lines Dep't*, 513 F.2d 1024 (2d Cir. 1975), *petition for cert. filed*, 43 U.S.L.W. 3684 (U.S. June 19, 1975) (No. 74-1601), *rev'g* 379 F. Supp. 679 (S.D.N.Y. 1974) 6, 8, 9

Employers Mutual Liability Insurance Co. v. *Arrien*, 224 F. Supp. 110 (N.D.N.Y. 1965) 22

PAGE

Espinoza v. *Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973) 6, 18, 22

Friedman v. *United States*, 374 F.2d 363 (8th Cir. 1967) 18

FTC v. *Jantzen, Inc.*, 356 F.2d 253 (9th Cir. 1966), *rev'd on other grounds*, 386 U.S. 228 (1967) 12

Geduldig v. *Aiello*, 417 U.S. 484 (1974) 4, 5, 6, 7, 8, 9, 10, 11, 26, 27, 29, 32, 33

Gilbert v. *General Electric Co.*, —— F.2d ——, 10 F.E.P. CAS. 1201 (4th Cir. June 27, 1975), *petition for cert. filed*, 43 U.S.L.W. 3675 (U.S. June 17, 1975) (No. 74-1590), *aff'g* 375 F. Supp. 367 (E.D. Va. 1974) 9, 15, 26, 27, 31

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 5, 11, 25

Hecht v. *Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) 18

Kettell v. *Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972) 18

Kohr v. *Weinberger*, 378 F. Supp. 1299 (E.D. Pa. 1974) 8

Morton v. *Ruiz*, 415 U.S. 199 (1974) 12

Newmon v. *Delta Air Lines, Inc.*, 374 F. Supp. 238 (N.D. Ga.), *aff'd*, 475 F.2d 768 (5th Cir. 1973) 12, 16

O'Neill v. *United States*, 281 F. Supp. 359 (N.D. Ohio 1968), *aff'd*, 410 F.2d 888 (6th Cir. 1969) 12

Ozawa v. *United States*, 260 U.S. 178 (1922) 18

PAGE

Phillips v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) 25

Rafford v. *Randle Eastern Ambulance Service, Inc.*, 348 F. Supp. 316 (S.D. Fla. 1972) 10
Ranes v. *Office Employees International Union*, 317 F.2d 915 (7th Cir. 1963) 22, 23

Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 13
Sprogis v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) 25

Toilet Goods Association v. *Finch*, 419 F.2d 21 (2d Cir. 1969) 18

United Housing Foundation, Inc. v. *Forman*, 95 S. Ct. 2051 (1975) 13, 17

Wetzel v. *Liberty Mutual Insurance Co.*, 511 F.2d 199 (3d Cir. 1975), *aff'g* 372 F. Supp. 1146 (W.D. Pa. 1974) 7, 10, 11, 12, 16, 19, 28, 29
Willingham v. *Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc) 6, 16, 18

Zachary v. *R.H. Macy & Co., Inc.*, 31 N.Y.2d 443 (1972) 18

Constitution & Statutes:

Fourteenth Amendment 4, 6, 7, 10, 11, 33

Civil Rights Act of 1964, Title VII, 78 Stat. 253, *as amended by* the Equal Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e *et seq.* .....*passim*
Section 703(h), 42 U.S.C. §2000e-2(h) 19
Section 716(a), 78 Stat. 266 20

PAGE

Equal Pay Act, 29 U.S.C. §206 .....19, 20
CAL. UNEMPL. INS. CODE §2626 (West 1972), *as amended*, CAL. UNEMPL. INS. CODE §§2626 and 2626.02 (West Supp. 1974) 22
HAWAII, L. 1969, Ch. 148 22
N.J. STAT. ANN. §43:21-29 (1962) 22
New York Disability Benefits Law, N.Y. WORKMEN'S COMP. L. §205 (McKinney 1965) 22, 23
LAWS OF P.R. ANN., T. 11, Ch. 9, §203(g)(2) (Supp. 1974) 22
5 RHODE ISL. GEN'L LAWS §28-41-8(1) (Supp. 1974) 22, 23

Regulations:

29 C.F.R. §800.110 20
29 C.F.R. §1604.9 .....3, 4, 11
29 C.F.R. §1604.10 .....3, 11
41 C.F.R. §60-20.3(g) 20
30 Fed. Reg. 14926 .....13, 19
33 Fed. Reg. 3344 13
33 Fed. Reg. 11539 13
34 Fed. Reg. 13367 13
37 Fed. Reg. 6835 .....3, 11
37 Fed. Reg. 6836 15
37 Fed. Reg. 6837 .....3, 11

Miscellaneous:

110 Cong. Rec. 2581 (1964) 19
110 Cong. Rec. 2584 (1964) 19
EEOC Decision No. 70-360 (Dec. 16, 1969), 1973 CCH EEOC DECS. ¶6084 .....13, 14
EEOC Decision No. 71-1474 (May 6, 1971), 1973 CCH EEOC DECS. ¶6221 17

PAGE

EEOC General Counsel opinion letter (July 28, 1966), BNA F.E.P. Rep. 401:3011-12 20
EEOC General Counsel opinion letter (Aug. 17, 1966), BNA F.E.P. Rep. 401:3017 15
EEOC General Counsel opinion letter (Oct. 17, 1966), BNA F.E.P. Rep. 401:3027 14
EEOC General Counsel opinion letter (Nov. 10, 1966), BNA F.E.P. Rep. 401:3030-31 15
EEOC General Counsel opinion letter (Nov. 15, 1966), BNA F.E.P. Rep. 401:3032 ..... 13, 14
EEOC General Counsel opinion letter (Feb. 17, 1967), BNA F.E.P. Rep. 401:3033-34 15
EEOC General Counsel opinion letter (Feb. 20, 1967), CCH Empl. Prac. Guide ¶17,304.59 33
Wage-Hour Administrator opinion letter (May 27, 1964), CCH Wages & Hours ¶30,851 20
1973 American Federation of Government Employees Health Benefit Plan (U.S. Civ. Serv. Comm'n, Bureau of Retirement, Insurance and Occupational Health, Form 41-26, Jan. 1973) 21
Bureau of Employment Security, U.S. Dep't of Labor, Rhode Island Disability Insurance Program (July 1954) 23
Comment, *Geduldig* v. *Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 Colum. L. Rev. 441 (1975) 8
Fuentes, *Federal Remedial Sanctions—Focus on Title VII*, 5 Valparaiso U.L. Rev. 387 (1971) 19
Johnston, *Sex Discrimination and the Supreme Court 1971-1974*, 49 N.Y.U.L. Rev. 617 (1974) 6, 8
Koontz, *Childbirth and Childbearing Leave: Job Related Benefits*, 17 N.Y.L.F. 480 (1971) 23

PAGE

1973 National Association of Letter Carriers Health Benefit Plan (U.S. Civ. Serv. Comm'n, Bureau of Retirement, Insurance, and Occupational Health, Form 41-51, Jan. 1973) 21
N.Y.S. Insurance Dep't, *In the Matter of Alleged Violations of Article IX-D of the Insurance Law*, Opinion and Report Pursuant to Section 278 of the Insurance Law (Jan. 28, 1975) 24
Report of the New York State Joint Legislative Committee on Industrial and Labor Conditions for the Year 1948, 11 New York Legislative Documents, 122nd Sess., Doc. No. 67 (1949) 24
State Employee Health Insurance Plans (Martin E. Segal Company 1973) 22
Transactions of the Society of Actuaries, *1962 Reports of Mortality and Morbidity Experience* 26
Transactions of the Society of Actuaries, *1971 Reports of Mortality and Morbidity Experience* 26
Transactions of the Society of Actuaries, *1973 Reports of Mortality and Morbidity Experience* 26
U.S. Civil Serv. Comm'n, Federal Personnel Manual, subch. 13-4(f) (rev. July 1969) 21
U.S. Civil Serv. Comm'n, Personnel Manual, subch. 4-4 (June 1967) 21
U.S. EEOC, First Annual Digest of Legal Interpretations, July 2, 1965 through July 1, 1966 20
U.S. EEOC 1st Annual Report, H.R. Doc. No. 86, 90th Cong., 1st Sess. (1966) 10, 11, 20
U.S. EEOC, Manual (Nov. 15, 1968 and July 25, 1969) 21
U.S. EEOC, Memorandum—"Advanced Sick Leave" (Dec. 20, 1972) 21
U.S. EEOC, Memorandum—"Advanced Sick Leave" (Jan. 26, 1973) 21

PAGE

U.S. EEOC SIXTH ANNUAL REPORT, H.R. DOC. No. 288, 92nd Cong., 2d Sess. (1972) 17
U.S. DEP'T OF HEW, VITAL AND HEALTH STATISTICS SERIES, *Time Lost from Work—1968* (Series 10, No. 71) 27
U.S. DEP'T OF HEW, VITAL AND HEALTH STATISTICS SERIES, *Current Estimates—1971* (Series 10, No. 79) 27
U.S. DEP'T OF HEW, VITAL AND HEALTH STATISTICS SERIES, *Current Estimates—1972* (Series 10, No. 85) 27
U.S. DEP'T OF HEW, VITAL AND HEALTH STATISTICS SERIES, *Disability Days—United States—1971* (Series 10, No. 90) 27
U.S. DEP'T OF JUSTICE, "Leave Policies and Regulations", Memo. No. 344 (March 8, 1963) 21
Communications Workers of America v. *American Telephone & Telegraph Co., Long Lines Dep't*, 513 F.2d 1024 (2d Cir. 1975), *petition for cert. filed*, 43 U.S.L.W. 3684 (U.S. June 19, 1975) (No. 74-1601), Brief of Alaska Airlines, Inc., et al., as Amici Curiae 15
Geduldig v. *Aiello*, 417 U.S. 484 (1974):
Brief for Appellant 23
Affidavit of Carl M. Peterson, Deputy Chief of the Unemployment Insurance—Disability Insurance Section, and Supervisor of the Disability Insurance Group of the California Department of Human Resources Development 27, 32
Brief for General Electric Company as Amicus Curiae 16, 26
Brief of American Telephone and Telegraph Company as Amicus Curiae 31
Brief of the United States Equal Employment Opportunity Commission as Amicus Curiae 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A Corporation,
Petitioner,

—v.—

SANDRA WETZEL and MARI ROSS, on Behalf of Themselves and All Others Similarly Situated,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN LIFE INSURANCE ASSOCIATION AND HEALTH INSURANCE ASSOCIATION OF AMERICA ON BEHALF OF PETITIONER

Interest of the Amici

The American Life Insurance Association and the Health Insurance Association of America are associations whose membership comprise most of the major life and health insurers in the United States. Together they number among their members approximately 500 insurance companies, which are responsible for approximately 92% of the total

life insurance in force in the United States and 90% of the total health insurance written by insurance companies. In addition, the members of the amici are major employers with aggregate work forces of well over 900,000 persons. As the nation's leading underwriters of temporary disability insurance, and as substantial employers, the members of amici share a two-fold interest in the outcome of this litigation.

Because of the nature and extent of the business of their members the amici are particularly qualified to present to this Court data regarding the purposes for which disability benefits are provided, and the consequences of mandating such coverage on account of normal pregnancy. They employ on their staffs highly qualified actuaries experienced in the health insurance and disability insurance areas, who are familiar with actuarial data relevant to this case which might not otherwise be brought to the attention of the Court.

The Decision Below

By its decision of February 11, 1975, the Third Circuit held violative of Title VII of the Civil Rights Act of 1964[1] certain employment practices of Liberty Mutual Insurance Company ("petitioner"), including its policy with respect to the denial of disability benefits to pregnant employees. Under petitioner's disability plan, disabled employees received a percentage of their salary for a period of time which varied according to the length of service of the employee. Benefits were provided for most causes of dis-

[1] 78 Stat. 253, *as amended by* the Equal Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e *et seq.*

ability. In addition to pregnancy, there were excluded from coverage disabilities on account of intentionally self-induced injuries, suicide attempts, employment-related injuries covered by workmen's compensation, and disability arising out of war.

The court of appeals viewed this case as one of statutory construction. It acknowledged the "meager" legislative history relating to the introduction of "sex" as a protected classification under Title VII. However, since Congress made no substantive changes in the statute with respect to sex discrimination when the statute was otherwise amended in 1972, the court concluded that Congress had, in effect, ratified the application of an expansive interpretation of the statute in sex discrimination cases.

The decision of the court below rested squarely on two Equal Employment Opportunity Commission sex discrimination Guidelines adopted eight years after the enactment of Title VII.[2] Citing this Court's decisions in previous Title VII cases relating to the persuasiveness of other EEOC Guidelines, and finding the cited Guidelines not "inconsistent" with congressional intent, the court below deferred to the Commission's interpretation of the statute.

The court of appeals summarily rejected a number of arguments raised by petitioner, including its contention that the Company's interest in protecting the financial integrity of the plan justified the pregnancy exclusion.[3] The

[2] 29 C.F.R. §§1604.9, 1604.10, 37 Fed. Reg. 6835, 6837 (April 5, 1972).

[3] Other arguments rejected by the court were that the "voluntary" nature of pregnancy justified different treatment from disability on account of sickness under temporary disability plans; and that, since coverage under the plan is limited to disability on account of sickness, pregnancy need not be covered.

court observed that no statistics were offered to demonstrate the cost impact of pregnancy coverage, and endorsed the EEOC Guideline which declares that cost is not a defense to a charge of discrimination in providing fringe benefits.[4]

Summary of Argument

In *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), this Court upheld the exclusion of benefits on account of normal pregnancy from a state temporary disability insurance plan. In so ruling, this Court characterized the exclusion as a classification founded upon cause of disability—not one founded upon gender. Such characterization is determinative in a Title VII case as well as in a 14th amendment case, since in either context the distinction is risk-based and does not constitute discrimination on account of sex. Further, the absence of two similarly situated groups who are treated differently precludes any finding of discrimination.

The court of appeals' unquestioning acceptance of the EEOC's 1972 pregnancy disability Guideline was erroneous. The available legislative history of Title VII, the almost universal practice at the time of Title VII's enactment to treat pregnancy differently from other causes of disability, and the contemporaneous interpretation of Title VII by the EEOC,[5] compel the conclusion that Congress did not in-

[4] 29 C.F.R. §1604.9(e).

[5] As we show *infra* at 11-24, the present Guidelines relied on by the court of appeals in this action were adopted by the EEOC *eight years* after the enactment of Title VII. They are not only inconsistent with the original, and long-held interpretation of the statute by the EEOC and other agencies; but they were adopted without public hearing, and without any investigation or in-depth consideration of the issues raised by them; and are thus entitled to no deference by the courts.

tend to impose on the nation's employers a pregnancy disability program costing, at a minimum, hundreds of millions of dollars annually.[5a]

Nor is such a burden required on the basis of an allegedly disparate effect on women resulting from the exclusion of pregnancy benefits. Even without such benefits, women receive more than their proportionate share of temporary disability benefits under existing plans. Consequently, no disparate effect within the meaning of this Court's ruling in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), can result from the exclusion of this one cause of disability.

The purposes for which temporary disability coverage is provided are not served by requiring the payment of disability benefits for normal pregnancy. The element of providing protection against an unanticipated loss of income is missing; pregnant women know of their impending "disability" in ample time to budget or plan for the future loss of earnings. Further, since so many women who leave employment by reason of pregnancy do not return to work,[6] disability benefits for pregnancy often do not serve the purpose of protecting the income of employees until they can return to the employer's work force; rather, such benefits become a form of severance pay.

Yet, if benefits on account of pregnancy were required by law, pregnancy would constitute the largest single cause

[5a] In *Geduldig* v. *Aiello*, 417 U.S. at 494 n.18 estimates were submitted to this Court indicating that the additional cost of providing pregnancy disability benefits in the State of California, alone, would be between $48.9 million and $131 million annually.

[6] Experience has shown that, while over 95% of employees who receive disability benefits return to employment, as many as 50% of employees who leave work on account of pregnancy do not return. See discussion *infra* at 30-31.

of disability for which benefits are paid; absent additional contributions 22% of the average temporary disability benefit fund would have to be diverted to provide benefits for this single cause of disability. The result could well be to discourage the introduction of new or different coverages which could be of benefit to all employees, to require longer "waiting periods" or the imposition of other restrictions on eligibility for benefits, to increase the contributions required from employees, or to compel a decrease in benefits for other causes of disability.

ARGUMENT

Omission of Disability Benefits on Account of Pregnancy Does Not Constitute Discrimination on Account of Sex

Coverage for disability on account of pregnancy is not afforded under private temporary disability plans for the same reasons that such coverage is excluded under the California Disability Benefits Law, upheld by this Court in *Geduldig* v. *Aiello*.[7] Whether such exclusion constitutes sex discrimination under the 14th amendment as claimed in *Geduldig*, or under Title VII as claimed here, the threshold issue is the same:[8] does the classification or distinction arising from the exclusion of benefits on account of pregnancy constitute a classification or distinction on the basis

[7] 417 U.S. 484 (1974).

[8] *See Espinoza* v. *Farah Mfg. Co., Inc.*, 414 U.S. 86, 95 (1973); *Willingham* v. *Macon Tel. Publishing Co.*, 507 F.2d 1084, 1088 (5th Cir. 1975) (en banc); *Communications Workers of America* v. *American Tel. & Tel. Co., Long Lines Dep't*, 379 F. Supp. 679, 682 (S.D.N.Y. 1974), *rev'd*, 513 F.2d 1024 (2d Cir. 1975), *petition for cert. filed*, 43 U.S.L.W. 3684 (U.S. June 19, 1975) (No. 74-1601); *see also* Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U.L. Rev. 617, 691 & n.276 (1974).

of sex? The holding of this Court in *Geduldig*—that the exclusion of coverage for pregnancy involved a classification based on risk, not one based on sex—is, therefore, dispositive here.

The court below summarily rejected the applicability of this Court's decision in *Geduldig* to a Title VII case. It viewed *Geduldig* as merely involving the question of whether the pregnancy exclusion sufficiently served the State's interest to satisfy the relevant 14th amendment standard.[9] This, we believe, is a misreading of this Court's decision. While *Geduldig* dealt with a 14th amendment claim, the language of that decision went far beyond the equal protection analysis necessary to sustain the statute under the 14th amendment. This Court could have upheld the statute without definitively characterizing the nature of the classification involved.[10] Similarly, it could have expressly reserved for later decision any intention to speak to Title VII issues.[11]

[9] *Wetzel* v. *Liberty Mut. Ins. Co.*, 511 F.2d 199, 203 (3d Cir. 1975).

[10] *See, e.g., Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 653 n.2 (1974) (Powell, J. concurring).

[11] *Id.* at 638-40 n.8; 656 n.6 (Powell, J. concurring).

It is notable that Mr. Justice Brennan, in his dissenting opinion in *Geduldig*, placed great emphasis on the EEOC's Guidelines under Title VII, despite the 14th amendment setting of that case, and expressly referred to the pregnancy disability Guideline at issue here. 417 U.S. at 501-02. Further, the EEOC, the *Geduldig* plaintiff, and various amici urged on the Court the importance of that case to Title VII litigation. *See, e.g.*, Brief of the United States Equal Employment Opportunity Commission as Amicus Curiae at 2, *Geduldig* v. *Aiello*, 417 U.S. 484 (1974).

Nevertheless, this Court did not expressly limit the applicability of its language and reasoning to the facts there before it, as it had done previously.

Instead, the Court did deal with the nature of the classification and concluded that the exclusion of pregnancy benefits did not discriminate on the basis of sex:[12]

> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. *While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed, supra, and Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics.*
>
> • • •
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. *The program divides potential recipients into two groups—pregnant women and nonpregnant persons.* While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

---

[12] 417 U.S. at 496-97 n.20 (emphasis added). *Accord, Communications Workers of America* v. *American Tel. & Tel. Co., Long Lines Dep't*, 379 F. Supp. 679 (S.D.N.Y. 1974), *rev'd*, 513 F.2d 1024 (2d Cir. 1975), *petition for cert. filed*, 43 U.S.L.W. 3684 (U.S. June 19, 1975) (No. 74-1601); *cf. Kohr* v. *Weinberger*, 378 F. Supp. 1299, 1304 (E.D. Pa. 1974).

The impact upon Title VII of this Court's decision in *Geduldig* has been recognized even by commentators hostile to the result reached. *See* Johnston, *supra* note 8, at 691 & n.276; Comment, *Geduldig* v. *Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441, 456 (1975).

Though the *Geduldig* plaintiffs claimed sex discrimination, this Court held that California's exclusion of pregnancy benefits did not constitute a sex-based distinction, but rather, a distinction based upon a particular cause of disability. This Court analyzed the issue as follows:

> The appelleee simply contends that, although she has received insurance protection equivalent to that provided all other participating employees, she has suffered discrimination because she encountered a risk that was outside the program's protection.[13]

This analysis goes to the heart of the issue presented here. As Judge Widener stated in his dissenting opinion in *Gilbert* v. *General Electric Co.*, —— F.2d ——, 10 F.E.P. CAS. 1201, 1206 (4th Cir. June 27, 1975), *petition for cert. filed*, 43 U.S.L.W. 3675 (U.S. June 17, 1975) (No. 74-1590):

> Absent a showing of sex discrimination, Title VII, even if its reach were broader than the equal protection clause, would not render unlawful a pregnancy exclusion such as that involved here. Since the Supreme Court has held, for precisely the same exclusion, there is a "lack of identity between the excluded disability and gender as such," the exclusion should no more support a finding of discrimination under Title VII than under the equal protection clause.[14]

The argument that *Geduldig* is not persuasive in a Title VII context because there are different standards

---

[13] 417 U.S. at 496-97.

[14] *See also Communications Workers of America* v. *American Tel. & Tel. Co., Long Lines Dep't*, 379 F. Supp. 679, 682 (S.D.N.Y. 1974), *rev'd*, 513 F.2d 1024 (2d Cir. 1975), *petition for cert. filed*, 43 U.S.L.W. 3684 (U.S. June 19, 1975) (No. 74-1601).

which are applied under that statute and the 14th amendment to justify otherwise discriminatory conduct, misses the point. Once it has been determined, as in *Geduldig,* that no prohibited discrimination exists, whether a higher standard must be met under Title VII to justify otherwise discriminatory conduct becomes irrelevant.

The court below recognized that "[t]he company's policy is neutral on its face . . . ." [15] However, it based its finding of sex discrimination on the erroneous assumption that the policy at issue "treats a protected class of persons in a disparate manner." [16]

The inappropriateness of applying disparate effect analysis to this case is discussed below. It is sufficient to say here that a risk-based classification which distinguishes between pregnant and nonpregnant persons does not involve sex discrimination. The concept of discrimination presupposes two similarly situated groups who are treated differently. There can be no "similarly situated" male and female employees with respect to disability benefits on account of pregnancy.[17]

---

[15] 511 F.2d at 206.

[16] *Id.*

[17] *See Cohen* v. *Chesterfield County School Bd.*, 474 F.2d 395, 397-98 (4th Cir. 1973), *rev'd on other grounds sub nom. Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632 (1974); *Rafford* v. *Randle Eastern Ambulance Serv., Inc.*, 348 F. Supp. 316, 320 (S.D. Fla. 1972).

The EEOC itself acknowledged that it was inappropriate to consider pregnant women similarly situated with sick disabled persons. The Commission's 1ST ANNUAL REPORT stated:

> The prohibition against sex discrimination is especially difficult to apply with respect to the female employee who becomes pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. *The pregnant female, however, has no analogous male counterpart and pregnancy necessarily must be treated uniquely.*
>
> U.S. EEOC, 1ST ANNUAL REPORT, H.R. Doc. No. 86, 90th Cong., 1st Sess. 40 (1966) (emphasis added).

The same conclusion is reaffirmed in a series of opinion letters released by the EEOC General Counsel. *See* discussion *infra* at 13-15.

[18] 29 C.F.R. §1604.10(b), 37 Fed. Reg. 6835, 6837 (April 5, 1972).

[19] 511 F.2d at 206.

[20] 29 C.F.R. §1604.9(e), 37 Fed. Reg. 6835, 6837 (April 5, 1972).

The complaint here, as in *Geduldig,* is not that male employees receive a benefit denied to female employees. Rather, it is that females are not protected when they encounter this particular additional risk. We submit that whether this complaint is made in a case under the 14th amendment, as in *Geduldig,* or in a case under Title VII, as here, the result must be the same. In either context the complaint does not involve discrimination on account of sex.

The EEOC Guidelines Here at Issue Should Be Rejected by This Court

The basic underpinning of the decision of the court below is its unquestioning reliance on the EEOC's Guideline relating to pregnancy disability.[18] The court further relied[19] on the Guideline which declares that the cost of providing fringe benefits is not a defense to a charge of discrimination.[20] The court held that the Guidelines were consistent with the "plain meaning" of Title VII; that they were entitled to the deference of the court "as required" by *Griggs;* and that "[u]nder the pertinent Guidelines, it is

discriminatory to treat pregnancy differently from other temporary disabilities." [21]

The court below accorded deference to the Guidelines even though the EEOC did not arrive at its present interpretation of the statute until 8 years after it was enacted. The court declared that the EEOC Guidelines were issued "to keep pace with changes in society's attitudes", and that this "evolutionary process" should not be seen as detracting from the respect due these Guidelines.[22] This deference to the EEOC Guidelines is misplaced.

A. *The Guidelines Lack Those Features Which Induce Courts to Accord Deference to Administrative Interpretations*

The principles followed by courts in determining the weight to be accorded interpretations by administrative agencies are well known. First, courts look to see whether the interpretation in question has been consistently followed over a long period of time.[23] Second, courts look to the interpretation which is closest in proximity to the time of the enactment pursuant to which it is issued.[24] Third, courts examine the available evidence of the care and consideration given by the agency to the policy contained in

[21] 511 F.2d at 205-06.

[22] *Id.* at 205.

[23] *See Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974); *FTC* v. *Jantzen, Inc.*, 356 F.2d 253, 257 n.4 (9th Cir. 1966), *rev'd on other grounds*, 386 U.S. 228 (1967); *O'Neill* v. *United States*, 281 F. Supp. 359, 364 (N.D. Ohio 1968), *aff'd*, 410 F.2d 888 (6th Cir. 1969).

[24] *See Brennan* v. *General Tel. Co.*, 488 F.2d 157, 160 (5th Cir. 1973); *Newmon* v. *Delta Air Lines, Inc.*, 374 F. Supp. 238, 245 (N.D. Ga.), *aff'd*, 475 F.2d 768 (5th Cir. 1973) (per curiam) [rejecting the same EEOC pregnancy disability Guideline at issue in this case].

the interpretation.[25] This Court has described the process to be followed:

> [t]he weight of such [administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[26]

Judged by these standards, the Guidelines at issue merit no deference. The facts relating to their promulgation underscore this. Title VII was enacted in 1964. In December 1965, the EEOC issued its first sex discrimination Guidelines.[27] From that date until April 1972, despite periodic amendments to the Guidelines,[28] the practice challenged in this proceeding escaped official condemnation.

Furthermore, between 1966 and 1969, the EEOC, through its General Counsel, responded to inquiries regarding the appropriate treatment of pregnancy under medical expense, leave of absence, and temporary disability plans, and declared that pregnancy need not be equated with sickness or disability. For example, in EEOC Dec. No. 70-360,[29] the Commission quoted an opinion letter of its General Counsel dated November 15, 1966:

[25] *See United Housing Foundation, Inc.* v. *Forman*, 95 S. Ct. 2051 (1975); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

[26] *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

[27] 30 Fed. Reg. 14926 (Dec. 2, 1965).

[28] 33 Fed. Reg. 3344 (Feb. 24, 1968); 33 Fed. Reg. 11539 (Aug. 14, 1968); 34 Fed. Reg. 13367 (Aug. 19, 1969).

[29] 1973 CCH EEOC Decs. ¶6084 at 4130 (Dec. 16, 1969).

> The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex . . . .

In an opinion letter addressed to the question of whether an employer could legally provide an unpaid maternity leave, where employees are entitled to paid sick leave, the EEOC General Counsel approved the practice, stating:

> [W]e do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness . . . .[30]

And in a letter responding to an inquiry regarding the legality of excluding from a salary continuation program benefits on account of pregnancy—the precise issue before this Court—the EEOC General Counsel set forth language identical to that contained in EEOC Dec. No. 70-360 quoted above, and added:

> [I]t is our opinion that according to the facts stated above, a company's group-insurance program which covers hospital and medical expense for the delivery of employees' children, but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth *would not be in violation of Title VII*.[31]

Thus, from the outset, the EEOC's response to the problem posed here was that identical treatment of pregnancy

[30] BNA F.E.P. Rep. 401:3032 (Nov. 15, 1966).

[31] BNA F.E.P. Rep. 401:3027 (Oct. 17, 1966) (emphasis added).

and sickness or disability was *not* required.[32] It was not until April 1972, that the EEOC first generally published its current, contrary interpretation.

On what basis did the EEOC arrive at its new interpretation? It was not on the basis of public hearings. None were conducted.[33] It was not on the basis of studies or new information brought to the attention of the EEOC. The Chief of the Legislative Counsel Division of the EEOC at the time of the drafting of the Guidelines testified that she neither conducted nor was aware of any studies or data relating to similarities between pregnancy and other causes of disability.[34] There were no statutory developments which impelled or even suggested the conclusion that the existing EEOC position was incorrect.

[32] Other EEOC General Counsel opinion letters emphasizing the propriety of treating maternity differently from sickness or injury include the following: BNA F.E.P. Rep. 401:3017 (Aug. 17, 1966) [requiring that maternity leave be given, even where other absences are grounds for separation from employment]; BNA F.E.P. Rep. 401:3030-31 (Nov. 10, 1966) [allowing exclusion of pregnancy from disability benefit plan]; BNA F.E.P. Rep. 401:3033-34 (Feb. 17, 1967) [maternity leave need not be granted on same terms as leave for sickness or disability].

[33] *See* 37 Fed. Reg. 6836 (April 5, 1972).

[34] *See* Brief of Alaska Airlines, Inc., et al., as Amici Curiae at 1a-6a, *Communications Workers of America* v. *American Tel. & Tel. Co., Long Lines Dep't*, 513 F.2d 1024 (2d Cir. 1975), *petition for cert. filed*, 43 U.S.L.W. 3684 (U.S. June 19, 1975) (No. 74-1601).

The cursory consideration given to the implications of its new position should be contrasted with the attention devoted to this matter by the EEOC during the first years after enactment of Title VII. Charles Duncan, General Counsel of the EEOC between August 8, 1965 and October 31, 1966, testified at the trial in *Gilbert* v. *General Electric Co.* that the position now taken by the EEOC was considered by the Commissioners during his tenure in office in the course of an extensive consideration of the appropriate treatment of maternity, and that the Commission chose, instead,

One district court examined these circumstances and found the new EEOC position totally lacking in factual support.[35] Thus, there is nothing to indicate the expertise or thoroughness of consideration which are hallmarks of an administrative interpretation entitled to deference by the judiciary.

The court below noted that in 1972 Congress did not amend Title VII with respect to the proscription of sex discrimination, and inferred from that a congressional endorsement of an expansive interpretation of the provision. 511 F.2d at 204.[36] The fact is, however, that such "endorsement" could not have encompassed approval of the EEOC's current pregnancy disability Guideline, since Congress was

---

to adopt the approach embodied in the General Counsel's opinion letters quoted above. *See* Brief for General Electric Company as Amicus Curiae at A-1 to A-7, *Geduldig* v. *Aiello*, 417 U.S. 484 (1974).

[35] *Newmon* v. *Delta Air Lines, Inc.*, 374 F. Supp. 238, 245 (N.D. Ga.), *aff'd*, 475 F.2d 768 (5th Cir. 1973) (per curiam).

[36] A more trenchant analysis of the congressional inaction was provided by the Fifth Circuit Court of Appeals, sitting en banc, in *Willingham* v. *Macon Tel. Publishing Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975):

> while it is argued that a lack of any change in this section in the 1972 amendments to the Act evidences Congressional agreement with the position of the E.E.O.C., it may be argued with equal force that the law was insufficiently developed at the time the amendments were considered to support any change. We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate.

first informed of the new interpretation after enactment of the 1972 amendments.[37]

This past term this Court declined to defer to an interpretation urged by the Securities and Exchange Commission stating:

> Traditionally the views of an agency charged with administering the governing statute would be entitled to considerable weight. . . . But in this case, the SEC's position flatly contradicts what appears to be a rather careful statement of the Commission's views in a recent release.
>
> • • •
>
> In view of this unexplained contradiction in the Commission's position we accord no special weight to its views. See *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U.S. 418, 426 (1972); *Blue Chip Stamps* v. *Manor Drug Stores* [43 U.S.L.W. 4707, 4714 n.10 (U.S. June 9, 1975)].[38]

Under the circumstances discussed above, the EEOC Guidelines at issue here are entitled to no better treatment.

---

[37] While the first publication of the EEOC's current position with respect to pregnancy disability came in EEOC Dec. No. 71-1474, 1973 CCH EEOC Decs. ¶6221 (May 6, 1971), the first hint of any change in policy communicated to Congress came in the EEOC's Sixth Annual Report which was transmitted to Congress on March 30, 1972, six days after the enactment of the 1972 amendments on March 24, 1972. U.S. EEOC, Sixth Annual Report, H.R. Doc. No. 288, 92nd Cong., 2d Sess. 12 (1972).

[38] *United Housing Foundation, Inc.* v. *Forman*, 95 S. Ct. 2051 (1975).

B. *The Guidelines Are Inconsistent With the Legislative History of Title VII and Other Indicators of Legislative Intent*

This Court had occasion to consider another unfounded EEOC interpretation in *Espinoza* v. *Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973). There, the EEOC had issued a Guideline declaring that discrimination on the basis of citizenship constituted discrimination on the basis of national origin within the meaning of Title VII. This Court looked to the interpretation first placed on the statute by the EEOC—again, through its General Counsel's opinion letters—and to subsequent inconsistent congressional enactments, in reaching the conclusion that the EEOC interpretation was not authorized by the statute. The court below distinguished *Espinoza,* declaring that it could find no "obvious" indications of contrary congressional intent such as this Court there found. We submit that the court below has ignored or disregarded abundant "compelling indications" that the EEOC's interpretations are incorrect.

1. Legislative History

One such "compelling indication" is the complete lack of formal legislative history to support an interpretation having drastic and widespread consequences both in government and private industry. *See Willingham* v. *Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1090.[39] The absence

[39] Had Congress wished to insert into this anti-discrimination law the requirement that pregnancy benefits be provided under a disability benefit plan, it would have taken little effort to make such an intention plain. *See Ozawa* v. *United States,* 260 U.S. 178, 192-94 (1922); *Toilet Goods Ass'n* v. *Finch,* 419 F.2d 21, 27 (2d Cir. 1969); *Friedman* v. *United States,* 374 F.2d 363, 366-67 (8th Cir. 1967); *Hecht* v. *Pro-Football, Inc.,* 444 F.2d 931, 945 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972); *Kettell* v. *Johnson & Johnson,* 337 F. Supp. 892, 895 (E.D. Ark. 1972); *Zachary* v. *R.H. Macy & Co., Inc.,* 31 N.Y.2d 443, 460 (1972).

of any meaningful formal legislative history pertaining to the Title VII proscription of sex discrimination has been widely recognized. The court of appeals herein referred to the available material as "meager", and noted that the provision was introduced into Title VII "in a tongue-in-cheek manner" in an effort to procure the defeat of the statute.[40]

Such fragments of legislative history as may be relevant suggest that Congress did not intend to mandate identical treatment of men and women with respect to fringe benefits. For example, Congresswoman St. George, in discussing the "sex" amendment, declared that women neither sought nor needed "special privileges".[41] Congresswoman Green, in her statements, made clear that no consideration had been given in committee to problems which might arise by reason of biological differences between men and women.[42] Finally, the inclusion of the Bennett Amendment[43] in Title VII, in order to harmonize interpretations under that statute and the Equal Pay Act[44] is of significance. Coupled with the interpretations of the Wage-Hour Administrator which did not compel employers to provide identical benefits to men and women, and the paramountcy given to Department of Labor interpretations, it is difficult to contend that Congress

[40] 511 F.2d at 204.

[41] 110 Cong. Rec. 2581 (1964).

[42] 110 Cong. Rec. 2584 (1964).

[43] Civil Rights Act of 1964, Section 703(h), 42 U.S.C. §2000e-2(h).

[44] 29 U.S.C. §206. *See* EEOC Guidelines, 30 Fed. Reg. 14926 (Dec. 5, 1965) (superseded); Fuentes, *Federal Remedial Sanctions—Focus on Title VII,* 5 Valparaiso U.L. Rev. 387, 392-93 (1971).

intended to introduce a requirement that identical benefits be paid.[45]

2. Contemporaneous Practices and Interpretations

Another such indication is the fact that, when Title VII was enacted, pregnancy was generally treated differently from sickness and injury, both in and outside of government.

Both the EEOC and Department of Labor, following the enactment of Title VII, viewed pregnancy as a condition requiring individualized and flexible treatment.[46]

Federal agencies promulgated leave of absence regulations which denied or restricted the use of "advance sick

[45] Until the amendment of the EEOC's Guidelines in 1972, the EEOC regarded as non-discriminatory fringe benefit plans which complied with either the "equal payments" test (*i.e.*, where an employer spends an equal amount for male and female employees to provide benefits, despite the fact that the benefits purchased are unequal) or the "equal benefits" test (*i.e.*, where the benefits provided male and female employees are identical). *See* EEOC General Counsel opinion letter, BNA F.E.P. REP. 401:3011-12 (July 28, 1966). *See also* opinion letter, described in U.S. EEOC, FIRST ANNUAL DIGEST OF LEGAL INTERPRETATIONS, July 2, 1965 through July 1, 1966 at 22-23; U.S. EEOC, 1ST ANNUAL REPORT, *supra* note 17, at 41-42.

The use of an "equal payments" test under the Equal Pay Act was endorsed by the Department of Labor prior to July 2, 1965, the effective date of the employment provisions of Title VII. *See* Civil Rights Act of 1964, Section 716(a), 78 Stat. 266; Wage-Hour Administrator opinion letter, CCH WAGES & HOURS ¶30,851 (May 27, 1964).

While the Equal Pay Act only applies to discrimination in wages, and the Wage-Hour Administrator has ruled that benefits on account of pregnancy do not constitute "remuneration for employment", *see* Guidelines, 29 C.F.R. §800.110 (1967), the alternative "equal payments"/"equal benefits" tests have been applied to other forms of insurance coverage provided as fringe benefits to male and female employees.

[46] *See* discussion *supra* at 13-15; *cf.* OFCC Guidelines, 41 C.F.R. §60-20.3(g) (1970).

leave" for pregnancy while permitting its use in connection with other causes of disability.[47] Federal agencies entered into collective bargaining agreements which accorded "disparate" treatment to pregnancy under medical expense and hospitalization plans.[48] Some agencies even imposed a mandatory period prior to the expected date of delivery for the commencement of maternity leaves of absence,[49] while no similar period of absence was required in advance of elective surgery or other anticipated periods of disability.

State and local governments, as well as private industry, similarly accorded different treatment to pregnancy than

[47] *See, e.g.*, U.S. CIVIL SERV. COMM'N, PERSONNEL MANUAL, subch. 4-4 at 630-10 (June 1967); U.S. CIVIL SERV. COMM'N, FEDERAL PERSONNEL MANUAL, subch. 13-4(f) at 630-29 (rev. July 1969); U.S. Dep't of Justice, "Leave Policies and Regulations", Memo. No. 344, §V(D) at 18 (March 8, 1963); U.S. EEOC, Memorandum—"Advanced Sick Leave" (Dec. 20, 1972); *id.* (Jan. 26, 1973):

> It has been brought to our attention that . . . maternity cases were singled out as the only example in our Advance Sick Leave Memorandum dated December 20, 1972. Our reason for indicating maternity cases as a specific example was that GSA Payroll has, on a continuing basis, refused to honor our requests for advance sick leave for normal pregnancy purposes since it is in direct conflict with U.S. Civil Service Commission rules and regulations. It was our feeling that if all employees were made aware of this fact, it would, perhaps, stop the numerous requests coming into the Personnel Division.

[48] *See, e.g.*, 1973 Nat'l Ass'n of Letter Carriers Health Benefit Plan (U.S. Civ. Serv. Comm'n, Bureau of Retirement, Insurance, and Occupational Health, Form 41-51, Jan. 1973) at 3, 10; 1973 American Fed'n of Gov't. Employees Health Benefit Plan (U.S. Civ. Serv. Comm'n, Bureau of Retirement, Insurance and Occupational Health, Form 41-26, Jan. 1973) at 3, 8.

[49] *See, e.g.*, U.S. Dep't of Justice, "Leave Policies and Regulations", *supra* note 47, §IV(D) at 17; U.S. EEOC, MANUAL §911(V) (Nov. 15, 1968 and July 25, 1969).

was accorded to other causes of absence, medical expense and disability.

One survey of coverages provided state employees under state health insurance plans in effect in January 1973, disclosed that in virtually every plan examined which provided pregnancy coverage, the coverage provided differed from the coverage accorded other causes of medical expense or hospitalization.[50]

The temporary disability insurance laws of New York, California, New Jersey, and Rhode Island—the only such laws in effect in 1964—all either totally excluded benefits on account of normal pregnancy, or accorded to pregnancy disability, treatment less favorable than was accorded to other causes of disability.[51]

Congress must be presumed to have been aware of the practices and policies in effect at the time of the enactment of a statute.[52] If Congress wished to work a change in

---

[50] *State Employee Health Insurance Plans* (Martin E. Segal Company 1973).

[51] In California and New York no benefits were payable on account of normal pregnancy. CAL. UNEMPL. INS. CODE §2626 (West 1972), *as amended*, CAL. UNEMPL. INS. CODE §§2626 and 2626.02 (West Supp. 1974); N.Y. WORKMEN'S COMP. L. §205 (McKinney 1965); N.J. STAT. ANN. §43:21-29 (1962) [maximum period of benefits is 4 weeks before and 4 weeks following delivery]; 5 RHODE ISL. GEN'L LAWS §28-41-8(1) (Supp. 1974) [benefits limited]. *Cf.* LAWS OF P.R. ANN., T. 11, Ch. 9, §203(g)(2) (Supp. 1974) [no benefits payable on account of normal pregnancy] (enacted 1968); HAWAII, L. 1969, Ch. 148 [no benefits payable on account of pregnancy] (repealed).

[52] *See, e.g., Espinoza* v. *Farah Mfg. Co., Inc.*, 414 U.S. 86, 90-91 (1973); *American Fed'n of Musicians* v. *Wittstein*, 379 U.S. 171 (1964); *Ranes* v. *Office Employees Int'l Union*, 317 F.2d 915, 917-18 (7th Cir. 1963). *See also Employers Mut. Liability Ins. Co.* v. *Arrien*, 244 F. Supp. 110, 114 (N.D.N.Y. 1965).

those practices, certainly it would have made its intention plain.[53]

3. The Known Cost Magnitude and Congressional Silence

Just as Congress gave no indication of an intention to alter existing nationwide practices with respect to the treatment of maternity by government and private industry, the record is similarly barren of evidence that Congress intended to enact a new and hugely expensive piece of social welfare legislation.

Yet the potentially staggering cost of requiring coverage for maternity was well known. At the time of the enactment of Title VII, the experience under the Rhode Island Temporary Disability Law, where pregnancy claims threatened to exhaust the benefit fund, was widely publicized.[54] In New York, the express exclusion of pregnancy under the State Disability Benefits Law[55] was explained in terms of cost:

---

[53] *See Ranes* v. *Office Employees Int'l Union*, 317 F.2d 915, 917-18. *See also* cases cited *supra* at note 39.

[54] *See* Koontz, *Childbirth and Childbearing Leave: Job Related Benefits*, 17 N.Y.L.F. 480, 485 & n.36 (1971); Brief for Appellant at 10-12, *Geduldig* v. *Aiello*, 417 U.S. 484 (1974).

The Rhode Island statute was originally construed so as to treat pregnancy as fully compensable under the statute, regardless of whether or not the claimant was physically disabled. Because of the severe drain on the insurance fund which this interpretation imposed, the statute was amended in 1946 to restrict benefits for maternity to fifteen weeks; yet even then, pregnancy claims for the year 1949-50, comprised 23% of all claims and 30% of total benefits paid. BUREAU OF EMPLOYMENT SECURITY, U.S. DEP'T OF LABOR, RHODE ISLAND DISABILITY INSURANCE PROGRAM 42 (July 1954). The plan was subsequently further amended and presently provides a maximum $250.00 pregnancy benefit. 5 RHODE ISL. GEN'L LAWS §28-41-8(1) (Supp. 1974).

[55] N.Y. WORKMEN'S COMP. L. §205(3) (McKinney 1965).

> To provide the protection deemed necessary to the workers of the State at reasonable cost, disabilities arising from pregnancy have been excluded.[56]

Despite this, Title VII and its legislative history contain no hint that any legislator voting on the bill had the slightest intention to enact a multi-million dollar benefit program by the last minute addition to an anti-discrimination statute of a prohibition on sex discrimination. The failure of Congress to have considered the manifold problems raised by an interpretation of Title VII which would proscribe the exclusion of maternity disability benefits[57] provides convincing evidence that such an interpretation was not intended.

---

[56] REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON INDUSTRIAL AND LABOR CONDITIONS FOR THE YEAR 1948, 11 NEW YORK LEGISLATIVE DOCUMENTS, 122nd Sess., Doc. No. 67, at 44 (1949).

[57] In promulgating a regulation prohibiting sex discrimination in the issuance, cancellation and renewal of insurance policies, the New York State Superintendent of Insurance specifically referred to the complexity of the policy issues involved:

> The proposed regulation does not mandate maternity benefits. While this issue is related to sex discrimination, it is essentially a different one: Do minimum health insurance requirements require the inclusion of maternity benefit insurance in basic health insurance contracts? Like the question of whether insurance coverage should be mandated for psychiatric care or alcoholism, a decision to mandate maternity benefits requires a balancing of the cost of providing such coverage and the importance and value of the social policy objective that the mandated coverage would realize. It also requires a determination of who should bear the cost of such insurance. . . . Such questions should be answered in proceedings specifically designed for this purpose. . . .

N.Y.S. Insurance Dep't, *In the Matter of Alleged Violations of Article IX-D of the Insurance Law*, OPINION AND REPORT PURSUANT TO SECTION 278 OF THE INSURANCE LAW at 4 n.5 (Jan. 28, 1975).

The Challenged Practices Do Not Constitute Discrimination on Account of Sex Under the Rationale of *Griggs* v. *Duke Power Co.*

Citing this Court's holding in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the court below proceeded on the assumption that the case before it involved a practice which was neutral on its face but disparate in its effect on a protected class. It reached this conclusion on the basis of the truism that if one excludes coverage of a solely female cause of disability the effect will fall solely upon females.

By focusing merely on a single cause of disability, such an approach acquires superficial plausibility. However, "disparate effect" analysis is valid only where the exclusion affects similarly situated persons differently[58]—a result which is impossible when only benefits on account of pregnancy are considered. Male and female employees *are* similarly situated in the broader context of overall benefits on account of disability. However, when the scope of inquiry is so broadened, the disparate effect disappears.

---

[58] This Court has made clear that the reach of Title VII extends to prohibit the use of even a neutral characteristic in such a manner as to have a disparate effect on the members of a protected class. Thus, in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971), this Court struck down a company rule prohibiting the employment of women with pre-school-age children, since no such restriction was placed on the employment of males with pre-school-age children. Similarly, in *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), the court of appeals invalidated a rule forbidding the employment of married stewardesses, since no similar rule governing marital status was applied to male employees. These cases, however, involve neutral characteristics *which pertain to men and women*. It is only where both men and women are similarly situated, *i.e.*, share the capacity to be burdened or benefited by the allegedly discriminatory conduct, that an employer runs afoul of Title VII by failing to treat men and women alike.

As this Court found in *Geduldig,* women, even without maternity coverage, were receiving benefits identical in content (although superior in terms of cost and frequency of usage) to those provided male employees. These findings are consistent with nationwide experience under disability income plans.

It is recognized that, under typical disability income plans, women, as a group, receive benefits greater than are received by men, as a group, even where pregnancy benefits are excluded. Data published in United States Government publications, insurance and actuarial publications, and the experience of the members of our associations and of private employers throughout the country demonstrate that the relative costs of temporary disability benefits for women, *excluding* pregnancy benefits, is more than 1½ times the cost of benefits received by men under such plans.[59]

---

[59] *See, e.g.,* TRANSACTIONS OF THE SOCIETY OF ACTUARIES: *1962 Reports of Mortality and Morbidity Experience,* Table 15 at 101 & text at 79; *1971 Reports of Mortality and Morbidity Experience,* Table 5 at 199-200 & text at 198; *1973 Reports of Mortality and Morbidity Experience,* Table 5 at 277 & text at 273.

This data is further supported by the experience of the General Electric Company, which found that in 1970 GE's average cost per insured employee of total benefits paid under its sickness and accident insurance plan was $82.57 for females and $45.76 for males; in 1971, the average cost for females was $112.91 and $62.08 for males. Brief for General Electric Company as Amicus Curiae at 24 n.16, *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). Similarly, this Court noted in *Geduldig* that female employees, while providing 28% of total contributions to the California State Insurance Fund, were drawing 38% of the benefits paid out of the Fund. 417 U.S. at 497 n.21.

Comparisons of male and female frequencies of utilization of temporary disability benefits also leads to the conclusion that females receive a disproportionate share of such benefits. *See, e.g., Gilbert* v. *General Electric Co.,* 375 F. Supp. 367, 377 (E. D.

Indeed, it is estimated by our actuaries that by treating pregnancy identically with other causes of disability this disparity will be increased to the point where the cost of providing coverage for women will be almost 2½ times the cost of providing male benefits under disability plans.[60] Thus, from the perspective of overall coverage under disability benefit plans, women suffer no "disparate" effects.

Under these circumstances, penalizing an employer who excludes disability benefits on account of pregnancy is not only inequitable, it is illogical. The same employer would have no Title VII problem if, instead of providing disability benefit coverage, he distributed equally among his employees the amount of money he would have spent for such coverage. Yet under such circumstances, it is clear

---

Va. 1974), *aff'd,* —— F.2d ——, 10 F.E.P. CAS. 1201 (4th Cir. June 27, 1975), *petition for cert. filed,* 43 U.S.L.W. 3675 (U.S. June 17, 1975) (No. 74-1590). *See also* U.S. DEP'T OF HEW, VITAL AND HEALTH STATISTICS SERIES: *Time Lost from Work—1968* (Series 10, No. 71), Table 2; *Disability Days—United States—1971* (Series 10, No. 90), Table 5; *Current Estimates—1971* (Series 10, No. 79), Tables 2, 5, 6, 8; *Current Estimates—1972* (Series 10, No. 85), Tables 2, 5, 6, 8.

[60] This estimate is predicated upon an average anticipated duration of pregnancy disability of 15 weeks under a typical plan offering 26 weeks of disability benefits, and a 21% increase in the number of female claims. The duration estimate approximates the actual experience in California prior to this Court's reversal of the lower court decision in *Geduldig. See* Affidavit of Carl M. Peterson, Deputy Chief of the Unemployment Insurance-Disability Insurance Section, and Supervisor of the Disability Insurance Group of the California Department of Human Resources Development, in support of the application of the State of California for a stay of judgment, *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). In fact, this estimate may be overly conservative. *See Gilbert* v. *General Electric Co.,* 375 F. Supp. at 377-78 (E.D. Va. 1974), *aff'd,* —— F.2d ——, 10 F.E.P. CAS. 1201 (4th Cir. June 27, 1975), *petition for cert. filed,* 43 U.S.L.W. 3675 (U.S. June 17, 1975) (No. 74-1590).

that the money so distributed, even if invested on a group insurance basis, could not provide female employees with disability benefits on account of pregnancy and also afford them coverage otherwise identical to that of male employees.

Furthermore, the "disparate effect" approach adopted by the court below could stimulate a veritable flood of additional litigation based upon claims of alleged discrimination. Carried to its logical conclusion, the courts could be called upon to examine any exclusion or limitation of coverage to discover whether it has a "discriminatory" impact on any protected group.[61]

Since no condition afflicts all protected groups identically,[62] the courts could be faced with the problem of evaluating whether disability plans containing any number of combinations of exclusions or limitations violate Title VII. This task of monitoring benefits provided in or excluded from benefit plans in order to create ideally balanced, "non-discriminatory" insurance, may well be an impossible

---

[61] For example, as the district court noted in this case, 372 F. Supp. 1146, 1162, gout is a condition which overwhelmingly afflicts males. Thus, any insurance policy which excludes or restricts the benefits available for this condition might be said to discriminate against men because the exclusion would have a disparate impact upon them.

[62] This is illustrated by the actual experience of a member of amici, in a study of non-maternity claims under certain group temporary disability income plans. This major stock life insurance company found that, for example, while hernias were responsible for 5.3% of total male days of disability in 1972, they only accounted for 1.6% of female days of disability during that period; on the other hand, disorders of the sex organs accounted for 10.1% of female days of disability, but only 2.0% of male days of disability in 1972.

one. The courts are neither equipped nor required[63] to perform such a task.

Payment of Disability Benefits on Account of Normal Pregnancy Does Not Further the Purposes of Temporary Disability Coverage

The court below described its conception of the purpose of disability coverage, and the reason it is offered by employers, in the following terms:

> . . . Employers offer disability insurance plans to their employees to alleviate the economic burdens caused by the loss of income and the incurrence of medical expenses that arise from the inability to work. A woman, disabled by pregnancy . . . [and] a person disabled by a temporary illness . . . both suffer a loss of income because of absence from work; . . . both incur medical expenses; and the pregnant woman will probably have hospitalization expenses while the other person may have none, choosing to convalesce at home.
>
> Thus, pregnancy is no different than any other temporary disability under an income protection plan offered to help employees through the financially difficult times caused by illness.[64]

---

[63] This is not to say that an employer would be free to manipulate his disability benefit plan by using a pretext to accomplish an invidious discrimination. For example, refusing coverage for sickle cell anemia might well constitute illegal discrimination against Black employees. To provide such coverage would not cause the gross distortion of benefit dollars which would be occasioned by coverage of pregnancy disability. Where the cost of such coverage is relatively minimal, and no valid reasons can be adduced to justify the exclusion, then the courts, as this Court made clear in *Geduldig*, 417 U.S. at 496-97 n.20, will be able to strike down pretextual invidious discrimination.

[64] 511 F.2d at 206.

This description overlooks a number of other highly relevant considerations which distinguish pregnancy from other causes of disability.

First, the major task of disability coverage is to provide protection for *unforeseen* and *unforeseeable* income loss occasioned by disability. While people may, indeed, engage in activities which carry with them some statistical risk of disability, people do not engage in such activities with the foreknowledge that they will become disabled. The nature of the risk is contingent, and the loss of income occasioned thereby generally cannot be budgeted for. In the case of pregnancy, however, some period of disability and resultant expense are not unforeseen. Couples know months in advance of the impending birth of their child and are in a position to make provision for the loss in income which the wife may suffer. Further, family planning is now widespread; as a result, a woman today has a great deal of control over whether or when she will become pregnant and whether she will bear a child.

Second, one of the most important reasons why employers offer temporary disability benefits to their workers is to provide a means of assisting them during periods of financial hardship until their return to the work force. In this manner employers generate loyalty among their workers and safeguard the investment in their training and experience. While available statistics indicate that virtually all employees who receive temporary disability benefits return to the work force, in the case of pregnancy, experience has shown that a substantial portion of pregnant employees will never return to work with the same employer.[65]

[65] Petitioner has submitted an affidavit indicating that 80% of female employees who leave work on account of maternity fail to return to active service and similar data is available relating to other employers. The Illinois Bell Telephone Company, for example, found that while approximately 3% of employees absent by reason of sickness or accident did not return to active employment, more than 48% of those employees who went on maternity leave failed to return. Brief of American Telephone and Telegraph Co. as Amicus Curiae at 10a and n.10, *Geduldig* v. *Aiello*, 417 U.S. 484 (1974). The experience of the General Electric Company was that 40% of employees who leave for reason of maternity do not return. *Gilbert* v. *General Electric Co.*, 375 F. Supp. 367, 378 (E.D. Va. 1974), *aff'd*, —— F.2d ——, 10 F.E.P. Cas. 1201 (4th Cir. June 27, 1975), *petition for cert. filed*, 43 U.S.L.W. 3675 (U.S. June 17, 1975) (No. 74-1590).

Thus, for the woman who leaves employment to have her baby and who fails to return to service, payment of disability benefits constitutes a bonus—a form of severance pay. This, we suggest, is not the appropriate function of disability plans, and would unjustifiably divert funds from coverages more needed by the work force as a whole.

Third, employers, in establishing benefit plans, seek to provide those coverages most beneficial to the work forces as a whole. Often benefits to be offered are the subject of collective bargaining, and represent the joint efforts of management and labor to maximize the benefits derived from the funds available. As was discussed *supra* at 26-27, the introduction of mandatory pregnancy disability benefits will grossly distort the allocation of benefits under existing disability plans.[66]

[66] It is this element of distortion of benefits which highlights the fallacy of the argument, suggested by the court below, that an employer who provides benefits for some causes of disability which are "voluntary" in nature (*e.g.*, elective surgery, cosmetic surgery, abortions, vasectomies, etc.), is required to provide such benefits for maternity. This argument loses sight of the relatively small dollar cost of such benefits. The decision to pay for these conditions has a positive effect on employee morale without distorting the allocation of benefits otherwise payable under the plan. There is no basis in sound employment practice, economics, or common sense for equating pregnancy coverage with coverage of other "voluntary" causes of disability.

The cost of requiring such coverage is too great to be ignored, and will have to be met either in the form of additional premium payments required of the employer or employee, or it will come at the expense of the work force in the form of a reduction of the existing level of benefits or deferral of additional coverage.[67] Whether, as a matter of social policy, it is desirable to mandate pregnancy coverage with its attendant burdens is a legislative judgment which, it is submitted, Congress did not make when it enacted Title VII.

[67] The impact of requiring pregnancy coverage cannot be overstated. In the *Geduldig* case, this Court was presented with evidence that, to avoid increasing contributions to the State Fund, it would be necessary to significantly reduce benefits to avoid insolvency. The examples offered were to reduce the maximum benefit by almost 50%, or to increase the waiting period before benefits are payable from 7 to 46 days. Peterson Affidavit, *supra*, note 60.

CONCLUSION

In *Geduldig* v. *Aiello*, this Court confronted the issue of whether the exclusion of disability benefits on account of pregnancy was a sex-based distinction and concluded that it was not. This characterization transcends the equal protection context of *Geduldig* and is dispositive of this case, requiring a reversal of the decision below.

Viewing the case as one of statutory construction, as did the court below, yields the same result. The EEOC's first efforts to define sex discrimination in connection with fringe benefits recognized as much by expressing as EEOC's original goal, to "seek an equitable balance between the needs of the employer and employee. . . ." [68]

Where an employer procures for his work force a disability benefit plan designed to meet the needs of the entire work force in an equitable manner, he should be deemed to have complied with Title VII. Absent a finding that the exclusion at issue is "a mere pretext" used for a discriminatory purpose, the statute should not be construed to authorize or compel the federal courts to rearrange the disability benefit coverages offered by employers.

There is nothing to suggest that Congress by enacting Title VII—a generally worded anti-discrimination statute —intended to prohibit the practices here at issue. What Congress would have enacted with respect to maternity benefits, had it considered them, or indeed what action Congress may in the future take in other contexts with respect

[68] EEOC General Counsel, opinion letter (Feb. 20, 1967) [summarized in CCH EMPL. PRAC. GUIDE ¶17,304.59].

to that subject, is irrelevant. This Court should reject an interpretation which would create new social insurance legislation on the basis of a statute never intended to accomplish such a purpose.

Respectfully submitted,

EDWARD SILVER
LARRY M. LAVINSKY
STEPHEN E. TISMAN
SARA S. PORTNOY
300 Park Avenue
New York, New York 10022
Attorneys for the Amici

Of Counsel:

PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022

KENNETH L. KIMBLE
General Counsel
American Life Insurance Association
1730 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

THOMAS J. GILLOOLY
Associate General Counsel
Health Insurance Association of America
750 Third Avenue
New York, New York 10017

Supreme Court, U. S.
FILED
JUL 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER 1975 TERM

NO. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

SANDRA WETZEL, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF AMICI CURIAE
of
OWENS-ILLINOIS, INC. and
THE SHERWIN-WILLIAMS COMPANY

LLOYD SUTTER
Suite 360, Prado North
5600 Roswell Road
Atlanta, Georgia 30342
Attorney for Amici Curiae

Of Counsel:
O'CALLAGHAN, SAUNDERS, SUTTER & STUMM
A Professional Association
Suite 360, Prado North
5600 Roswell Road
Atlanta, Georgia 30342
(404) 252-2400

By consent of the petitioner and the respondent as evidenced by the letters of consent appended hereto, Owens-Illinois, Inc. and The Sherwin-Williams Company file this joint brief as *amici curiae*.

INDEX

PAGE

TABLE OF AUTHORITIES CITED ii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. Failure to provide the same disability benefits to "pregnant women and nonpregnant persons" is not discrimination because of sex prohibited by Title VII 5

II. EEOC Guidelines, Section 1604.10(b) is not entitled to judicial deference because:

A. It was arbitrarily and capriciously adopted without proper procedural safeguards and without consideration of either its medical or fiscal implications 10

B. It was not adopted contemporaneously with the Act's sex discrimination prohibitions and is not consistent with prior agency interpretations of the Act 13

C. Neither the Act nor its 1964 and 1972 legislative history support deferral 17

CONCLUSION 24

PROOF OF SERVICE 25

TABLE OF AUTHORITIES CITED

CASES	PAGE
Albermarle Paper Co. v. Moody, 43 U.S.L.W. 4880 (U.S. June 25, 1975) (No. 74-389)	2
Arizona v. California, 373 U.S. 546 (1963)	22
Burwell v. Eastern Air Lines, Inc., 9 EPD Para. 10, 234 (E.D. Va. 1975)	2
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)	8, 10, 12
Cohen v. Chesterfield County School Board, 474 F.2d 395, 397-98 (4th Cir. 1973), rev'd 414 U.S. 632 (1974)	8, 12
Communications Workers of America v. American Telephone & Telegraph Co., ___ F.2d ___, 9 EPD Para. 10,035 (2d Cir. 1975)	7, 13
Dewey v. Reynolds Metal Co., 429 F.2d 324 (6th Cir. 1970), aff'd 402 U.S. 689 (1971)	21
Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1971), cert. denied 404 U.S. 950 (1971)	17
Dodge v. Giant Foods, Inc., 488 F.2d 1333 (D.C. Cir. 1973)	10
EEOC v. Sherwin-Williams Co., N.D. Ohio, C.A. No. 75-423 (filed May 14 ,1975)	3
Espinoza v. Farah Mfg. Co., 462 F.2d 1331 (5th Cir. 1972), aff'd 414 U.S. 811 (1973)	6, 13, 17, 22
Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973)	10
FTC v. Jantzen, Inc., 356 F.2d 253 (9th Cir. 1966) rev'd 386 U.S. 228 (1967)	16

	PAGE
Geduldig v. Aiello, 417 U.S. 484 (1974)	4, 6, 7, 8, 9
Gilbert v. General Electric Co., 375 F.Supp. 367 (E.D. Va. 1974), aff'd 44 U.S.L.W. 2013 (4th Cir. June 27, 1975) (No. 74-1557)	3, 7, 15
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	17, 20
Grimmer v. Eastern Air Lines, Inc., N.Y. Div. Human Rts., Case No. CSF-29861-73 (1974)	9
Herrera v. Yellow Freight Systems, Inc., 505 F.2d 66 (5th Cir. 1974)	2
Newmon v. Delta Air Lines, Inc., 374 F.Supp. 238 (N.D. Ga. 1973)	8, 9, 12
NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974)	11, 13
NLRB v. Boeing Co., 412 U.S. 67 (1973)	13, 17
NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969)	13
Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971)	4, 6
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)	17, 22
Rosen v. Public Service Electric & Gas Co., 328 F.Supp. 454 (D.N.J. 1971)	17
Skidmore v. Swift & Co., 323 U.S. 134 (1944)	16
Smith v. Universal Services, Inc., 4 EPD Para. 7617 (5th Cir. 1972)	16
Stansell v. Sherwin-Williams Co., N.D. Ga., C.A. No. 75-379A (filed February 28, 1975)	3
Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)	18

PAGE

Wetzel v. Liberty Mutual Ins. Co., 511 F.2d 199 (3d Cir. 1975) 7

Williams Enterprises, Inc., 212 NLRB No. 132 (1974) 2

Willingham v. Macon Telegraph Publishing Co., ___ F.2d ___, 9 EPD Para. 9957 (5th Cir. 1975) (*en banc*) 10, 22

W. W. Cross & Co. v. NLRB, 174 F.2d 875 (1st Cir. 1949) 2

Constitution and Statutes

U. S. CONSTITUTION, Article I, Section 1 ..... 6, 21

U. S. CONSTITUTION, Article I, Section 8, Clause 18 ..... 6, 12

ADMINISTRATIVE PROCEDURE ACT, 80 Stat. 381, 5 U.S.C. Sec. 551, *et seq.*
5 U.S.C. Sec. 553 11

CIVIL RIGHTS ACT OF 1964 (TITLE VII), 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. Sec. 2000e *et seq.* 4

42 U.S.C. Sec. 2000e-(j) 20, 21

42 U.S.C. Sec. 2000e-2 ..... 2, 4, 6, 14

42 U.S.C. Sec. 2000e-2(h) 20

42 U.S.C. Sec. 2000e-4(e) 15

42 U.S.C. Sec. 2000e-5(g) 4, 5, 9

42 U.S.C. Sec. 2000e-12(a) 10

42 U.S.C. Sec. 2000e-12(b) 11

42 U.S.C. Sec. 2000e-15(a) 14

PAGE

NATIONAL LABOR RELATIONS ACT, 49 Stat. 449, as amended, 29 U.S.C. Sec. 151, *et seq.*

29 U.S.C. Sec. 158(a)(5) and 158(d) 2

29 U.S.C. Sec. 156 11

Executive Orders and Federal Regulations

EXECUTIVE ORDER 11246, 30 F.R. 12319 (1965) 2, 11

EXECUTIVE ORDER 11375, 32 F.R. 14303 (1967) 11

EEOC SEX DISCRIMINATION GUIDELINES, 29 C.F.R. 1604.10, 37 F.R. 6835 (April 5, 1972) 2, 14, 17, 20, 23

29 C.F.R. 1604.10(b) 3, 4, 5, 9, 10, 12, 13, 17, 20, 21, 22, 23, 24

41 C.F.R. 60-60 11

30 F.R. 14926 12

33 F.R. 3344 12

34 F.R. 13367 ..... 12, 19

40 F.R. 13311 11

Legislative History

Senate Hearings on S. 2453, 91st Cong., 1st Sess., p. 38 (1969) 19

House Hearings on H.R. 6228 and 13517, 91st Cong., 1st and 2d Sess., p. 32 (1969-1970) 19

Senate Hearings on S. 2515, S. 2617, and H.R. 1746, 92d Cong., 1st Sess., p. 48 (1971) 19

House Hearings on H.R. 1746, 92d Cong., 1st Sess. p. 79 (1971) 19

H. Rpt. No. 92-238, 92d Cong., 1st Sess., pp. 3-5 (1971) 19

PAGE

2 U.S. CODE CONG. & ADMIN NEWS 2137 (1972) 18
110 CONG. REC. 2577-2584 (1964) 17, 18
110 CONG. REC. 2720 (1964) 18
110 CONG. REC. 2804 (1964) 17
117 CONG. REC. 31960, 31975 (1971) 19, 20
118 CONG. REC. 295, 1383, 3383 (1972) 19
118 CONG. REC. 705, 723 (1972) 20

Miscellaneous

1 CCH Emp. Prac. Guide, Para. 3950 12
CCH EEOC Decisions, Para. 6084 (1969) 16
CCH EEOC Decisions, Para. 6221 (1971) 16
Administrative Law – Casebook 42 (1965 ed.) 23
40 Geo. Wash. L. Rev. 824 (1972), Pope & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972* 18
84 Harv. L. Rev. 1109, 1167 (1971) 18
May 7, 1971, letter authored by Ms. Mary Jean Collins-Robson, President, Chicago Chapter of the National Organization for Women, Hearings on S. 2515 and S. 2617, and H.R. 1746 before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 92 Cong., 1st Sess., p. 434 (1971) 19
Statement of Mrs. Lucille H. Shriver, Director, National Federation of Business and Professional Women's Clubs, Inc., on October 6, 1971, during Hearings on S. 2515, S. 2617, and H.R. 1746, before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 1st Sess., p. 272 (1971) 19

IN THE

Supreme Court of the United States

OCTOBER 1975 TERM

NO. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

SANDRA WETZEL, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF AMICI CURIAE
of
OWENS-ILLINOIS, INC. and
THE SHERWIN-WILLIAMS COMPANY

INTEREST OF THE AMICI CURIAE

OWENS-ILLINOIS, INC. ("Owens-Illinois") and The Sherwin-Williams Company ("Sherwin-Williams"), major national manufacturers of container and paint products, respectively, employ throughout the United States a substantial number of female employees. Of these female employees, many fall within the "affected group" alleged to be discriminated against because of sex as a result of the failure of *Amici Curiae* to comply with maternity benefit standards promulgated by the Equal Employment Opportunity Com-

mission ("EEOC") in Section 1604.10 of its April 5, 1972, "Sex Discrimination Guidelines," 29 C.F.R. 1604.10,[1] which reversed the agency's prior interpretation of Title VII of the Civil Rights Act of 1964, as amended ("the Act"), 42 U.S.C. Sec. 2000e-2.

While their respective plans take varying forms,[2] Owens-Illinois and Sherwin-Williams – like most employers throughout the Nation – do not provide medical and disability benefits for normal pregnancy and childbirth "on the same terms and conditions as they are applied to other temporary disabilities," Guidelines, Section 1604.10(b), *viz.*, on the same bases as medical and disability benefits provided male and female employees who sustain non-occupational illnesses or injuries. As a result, Owens-

[1] Section 1604.10 (hereinafter referred to as "Guidelines") provides, *inter alia*:

> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority, and other benefits and privileges, reinstatement, and payments under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

[2] Amici Curiae plans include those unilaterally adopted and those negotiated in good faith with collective bargaining representatives of appropriate units of their employees pursuant to obligations arising under the National Labor Relations Act ("NLRA"), 29 U.S.C. Secs. 158(a)(5) and 158(d). The obligation to bargain collectively in good faith cannot be easily avoided by invocation of Title VII or Executive Order 11246, *see Williams Enterprises, Inc.*, 212 NLRB No. 132 (1974). *Cf. W. W. Cross & Co. v. NLRB*, 174 F.2d 875 (1st Cir. 1949) (employee benefit plans are mandatory subject of collective bargaining). Negotiated plans also raise the question of joint labor-management backpay liability exposure. *Cf. Albermarle Paper Co. v. Moody*, 43 U.S.L.W. 4880 (U.S., June 25, 1975) (No. 74-389); *Herrera v. Yellow Freight Systems, Inc.*, 505 F.2d 66 (5th Cir. 1974); *Buxwell v. Eastern Air Lines, Inc.*, 9 EPD Para. 10,234 (E. D. Va. 1975).

Illinois is a respondent to an administrative proceeding in which the EEOC has made a "Determination" that there exists "reasonable cause to believe that respondent's maternity leave policy and benefits are not in compliance with the Commission's Guidelines on Discrimination Because of Sex, and are in violation of Title VII." EEOC Charge No. TSL4-2387 (May 17, 1975). Similarly, Sherwin-Williams is a defendant in both a public and a private action alleging violation of Title VII as a result of a maternity benefits policy which does not comply with the same EEOC Sex Discrimination Guidelines. *EEOC v. Sherwin-Williams Company*, N.D. Ohio, C.A. No. C75-423, filed May 14, 1975; and *Stansell, et al. v. Sherwin-Williams Company*, N.D. Ga., C.A. No. C75-379A, filed February 28, 1975.

Owens-Illinois and Sherwin-Williams have more than an academic interest in the outcome of this *Liberty Mutual* litigation: if the decision of the United States Court of Appeals for the Third Circuit is allowed to stand, its principles will in all likelihood control the above-cited administrative and judicial proceedings and will require either an extremely costly expansion of non-occupational disability benefit coverage to include pregnancy and childbirth[3] or it will require a substantial reduction in benefit amounts to be paid in the future for non-occupational disabilities arising out of illness or injury in order to provide the same cover-

[3] In Appendix A to its Amicus Curiae Brief in support of the grant of the petition for writ of certiorari in the instant case, the U.S. Chamber of Commerce quoted the typical disability plan percentage cost increase which the insurance industry estimated if the Guidelines, Section 1604.10(b) are judicially approved: "the addition of a disability income benefit to cover maternity absences would result in an additional cost to the employer of about 40 to 50 percent of his current costs for the plan."

According to Actuary Paul Jackson, who testified in *Gilbert v. General Electric Co.*, "the annual cost of adding maternity benefits to the sickness and accident disability income plans currently in effect in the United States would be $1,353,000,000." Brief for General Electric Company, filed in the U.S. Court of Appeals for the Fourth Circuit in *Gilbert v. General Electric Co.*, p. 8.

age for maternity and yet maintain the same disability benefit plan costs.[4]

SUMMARY OF ARGUMENT

The issue of vital interest to Owens-Illinois and Sherwin-Williams is whether they may continue to exclude maternity and related conditions from the coverage of their non-occupational disability benefit programs without violating the "sex" discrimination prohibitions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e, *et seq*. Collaterally, *Amici Curiae* urge this Court to refuse to defer to Section 1604.10(b) of the EEOC's "Sex Discrimination Guidelines" issued April 5, 1972.

The *Amici Curiae* submit that differentiation "for [a] reason other than discrimination on account of . . . sex," Section 706(g) of the Act, 42 U.S.C. Sec. 2000e-5(g), in the provision of benefits between "pregnant women and non-pregnant persons" who are disabled as the result of non-occupational illnesses or injuries is not "sex" discrimination within the meaning of Section 703 of the Act, 42 U.S.C. Sec. 2000e-2, and believe that this Court has so suggested in its prior decisions in *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971) and *Geduldig v. Aiello*, 417 U.S. 484 (1974).

Furthermore, *Amici Curiae* contend that EEOC Guidelines, Section 1604.10(b), is not entitled to deferral because: (1) that section was adopted arbitrarily and capriciously without compliance with procedural safeguards and without consideration of either its medical or fiscal implications; (2) that section was not adopted con-

[4] A corresponding 40-50 percent reduction in benefits available to male and female employees who suffer non-occupational disabilities caused by illness or injury could be necessary in order to avoid the tremendous cost increase Section 1604.10(b) otherwise would require.

temporaneously with the Act and is not consistent with prior EEOC interpretations of the Act indicating that exclusion of maternity from disability coverage did not violate the Act; and (3) neither the Act, nor its 1964 or 1972 legislative history support deferral to such an interpretation of the Act.

Finally, *Amici Curiae* strongly believe that matters such as herein involved, which effect major alterations in social philosophy and insurance industry practices, as well as the cost thereof, dictate that the obligations such as provided in Section 1604.10(b) should be imposed, if at all (and they should not be), only by Congress after careful deliberation through the legislative hearing and debate process, rather than by administrative agency fiat or judicial decision.

All of the foregoing arguments support reversal by this Court of the decision of the United States Court of Appeals for the Third Circuit, accompanied by a declaration by this Court that differentiation in the provision of disability benefits on the basis of pregnancy, not sex, does not violate Title VII and Federal court deferral to EEOC Guidelines, Section 1604.10(b), is unwarranted.

ARGUMENT

I.

The Failure to Provide the Same Disability Benefits to "Pregnant Women and Nonpregnant Persons" Is Not Discrimination Because of Sex Prohibited by Title VII.

Congress provided in the Act that "[n]o order of the court shall require . . . the payment . . . of any back pay . . . if [the personnel action complained of was taken] for any reason other than discrimination on account of . . . sex . . .", Section 706(g) of the Act, 42 U.S.C. Sec. 2000e-5(g). As

the United States Court of Appeals for the Fifth Circuit so carefully reasoned:

> Quite obviously, a great host of arbitrary and discriminatory employment practices, far too numerous to mention, remain unchecked and unhampered by the Act. . . . Though the general policy of the Act doubtless was to halt arbitrary employment practices, through the unmistakable words of the Act's actual text Congress has offered its conception of the *specific spheres* in which this general policy is to operate, and thereby has necessarily limited the policy's outreach. *See Moragne v. United States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). (Emphasis added.)

Espinoza v. Farah Mfg. Co., Inc., 462 F.2d 1331, 1334 (1972), aff'd 414 U.S. 811 (1973). Section 703 of the Act, 42 U.S.C. Sec 2000e-2, established but five "specific spheres" or bases of prohibited employment practices: race, color, religion, sex, or national origin. It is for Congress, not the EEOC, to expand *legislatively* these statutory "spheres." U.S. Constitution, Article I, Section 1 and Section 8, Clause 18.

In a recent decision, this Court defined "sex discrimination" as it perceived Congress' intent in enacting Section 703 of the Act, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); and it suggested that the exclusion of pregnancy from disability benefit coverage was not "sex discrimination" in *Geduldig v. Aiello*, 417 U.S. 484 (1974). In *Phillips*, this Court held:

> Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men — each having pre-school age children.

400 U.S. at 544. Subsequently, in *Aiello*, a majority of this Court expressly rejected the theory (which is the major premise of the Third Circuit's decision now before this Court for review, as well as the similar decisions rendered by the Courts of Appeal for the Second and Fourth Circuits)[5] that "dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex inevitably constitutes sex discrimination," 417 U.S. at 501 (dissent). In so doing, the majority suggested what should also become the correct application of the Act to the maternity benefit issue now before the Court:

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed*, 404 U.S. 71, and *Frontiero v. Richardson*, 411 U.S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy — from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra*, and *Frontiero, supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the

---

[5] *Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199 (3d Cir. 1975); *Communications Workers of America v. American Telephone and Telegraph Co.*, ___ F.2d ___, 9 EPD Para. 10,035 (2d Cir. 1975); *Gilbert v. General Electric Co.*, ___ F.2d ___, 44 U.S.L.W. 2013 (4th Cir. June 27, 1975) (No. 74-1557). *Contra: Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238 (N.D. Ga. 1973). Although the *Wetzel* decision was particularly critical of the "voluntariness" argument, *viz.*, that with today's contraceptive methods pregnancy can largely be avoided, Owens-Illinois and Sherwin-Williams find it socially and morally questionable to require employers to underwrite the cost of family planning, rather than the individual whose pregnancy — substantially if not wholly through her own action — prevents her from being able to work, the normal *quid pro quo* for receiving compensation.

members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

417 U.S. at 496-97, n. 20.

As Judge Haynsworth recognized[6] in *Cohen v. Chesterfield County School Board*, 474 F.2d 395, 397-398 (4th Cir. 1973), rev'd 414 U.S. 632 (1974):

> Only women become pregnant; only women become mothers. But Mrs. Cohen's leap from those physical facts to the conclusion that any regulation of pregnancy and maternity is an invidious classification of sex is merely simplistic. The fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this area. No man-made law or regulation excludes males

[6] While such reasoning may not pass constitutional muster to justify mandatory commencement of maternity leave at an arbitrary date when the pregnant female is nevertheless as physically capable as her male counterpart to perform her job, it certainly should support a constitutionally and statutorily defensible differentiation in benefits afforded a female on maternity leave as opposed to men and women alike disabled by non-occupational illness or injury. *Compare Cohen v. Chesterfield County School Board* and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (companion cases), *with Geduldig v. Aiello*, 417 U.S. 484 (1974). In *Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238 (N.D. Ga. 1973), Judge Henderson condemned as sexually discriminatory under the Act the mandatory maternity leave commencement policy, but recognized that fringe benefit differentiation, notwithstanding the EEOC's Guidelines to the contrary, did not violate the Act.

> from those experiences, and no such laws or regulations relieve females from all of the burdens which naturally accompany the joys and blessings of motherhood . . . Pregnancy and maternity are *sui generis*, and a governmental employer's notice of them is not an invidious classification by sex.

Owens-Illinois and Sherwin-Williams, like the State of California and most employers in the Nation, maintain separate benefit programs for two distinct groups of employees, classified in the words of this Court in *Aiello*: "pregnant women and nonpregnant persons." 417 U.S. at 497, n. 20. The former is a unique classification of physiologically *normal*[7] pregnant women who are unable to work for an individually determinable[8] pre- and postpartem period; the latter is the only classification in which benefits can and do accrue to male and female employees alike for non-occupational disability resulting from physiologically *abnormal* conditions: illness or injury.

It is simply not "sex discrimination," within the meaning of Section 703 of the Act, to differentiate "for any reason other than discrimination on account of . . . sex," Section 706(g), 42 U.S.C. Sec. 2000e-5(g), *i.e.*, pregnancy, not sex, in the provision of benefits between the foregoing groups. As two Federal circuit courts have eliminated the "haircut cases" from the scope of the sex discrimination

[7] *See Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238 (N.D. Ga. 1973). *See* footnote 14 and accompanying text, *infra*, reflecting that the author of Section 1604.10(b) had no EEOC study or other medical facts on which she based the guideline.

[8] According to the expert medical testimony of Dr. Vincent Tricome, Chief of Gynecology for one of New York City's largest hospitals, before the New York State Human Rights Division in *Grimmer v. Eastern Air Lines, Inc.*, Case No. CSF-29861-73, on January 30, 1974, a "normal" pregnancy might be expected to require for most job classifications maternity leave commencing from two to three weeks before and lasting no more than six weeks after delivery. *Compare Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238, 240 (N.D. Ga. 1973) (physician approved return to work six weeks after delivery).

prohibitions of the Act,[9] this Court should remove the maternity benefit issue from the ambit of the Act by refusing to defer to Guidelines, Section 1604.10(b).

II.

Guideline Section 1604.10(b) Is Not Entitled to Judicial Deference.

In *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639 n. 8 (1974), this Court recognized that Section 1604.10 and related Guidelines "will affect like suits in the future" and "express[ed] no opinion as to the validity of any of these regulations." The validity of Section 1604.10 is now at issue.

A. Guideline, Section 1604.10(b), was arbitrarily and capriciously adopted without proper procedural safeguards and without consideration of either its medical or fiscal implications.

Owens-Illinois and Sherwin-Williams entertain serious reservations whether the EEOC has been authorized by Congress to issue *any* "Guidelines" such as those promulgated April 5, 1972, out of which the instant litigation arises. Section 713(a) of the Act, 42 U.S.C. Sec. 2000e-12(a), authorizes the EEOC "to issue, amend, or rescind suitable *procedural* regulations to carry out the provisions of this title" (emphasis added). EEOC was granted only *procedural, not substantive,* rulemaking authority, a clear indication of Congress' intent to allow EEOC substantially less rulemaking authority than most other administrative

[9] *See Willingham v. Macon Telegraph Publishing Co.*, ___ F.2d ___, 9 EPD Para. 9957 (5th Cir. 1975) (*en banc*); *Fagan v. National Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973); *Dodge v. Giant Foods, Inc.*, 488 F.2d 1333 (D.C. Cir. 1973).

agencies, such as the National Labor Relations Board ("NLRB").[10]

And even if EEOC had rulemaking authority comparable to the NLRB, it should be compelled, when engaging in substantive rulemaking, to follow the procedural safeguards provided by the Administrative Procedure Act ("APA"), 5 U.S.C. Sec. 553.[11]

Yet EEOC claimed in its prefatory statement accompanying its April 5, 1972, "Sex Discrimination Guidelines" which, it should be noted, were published in the *Federal Register* section entitled "Rules and Regulations":

> Because the material herein is interpretative in nature, the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, opportunity for public participation, and delay in the effective date are inapplicable.

37 F.R. 6835, 6836 (April 5, 1972), citing as "authority" for publication Section 713(b) of the Act, 42 U.S.C. Sec. 2000e-12(b).

[10] *Compare* 29 U.S.C. Sec. 156, NLRB rulemaking authority is not limited by a "procedural" qualifier such as is contained in Section 713(a) of the Act, 42 U.S.C. Sec. 2000e-12(a).

[11] This Court last year summarized the APA safeguards:

> [P]ublication in the *Federal Register* of notice of the proposed rulemaking and hearing; an opportunity for interested persons to participate; a statement of the basis and purpose of the proposed rule; and publication in the *Federal Register* of the rule as adopted.

NLRB v. Bell Aerospace Co., 416 U.S. 267, 291 n. 21 (1974).

Compare 40 F.R. 13311 wherein the United States Department of Labor proposed certain additions to its Revised Order No. 14, 41 C.F.R. 60-60 with respect to how the Office of Federal Contract Compliance proposes to proceed to ascertain what constitutes an "affected class" and how to compute "backpay relief" in its administration and enforcement of Executive Orders 11246 and 11375. *Query* why EEOC views its rulemaking authority to be unrestrained by the procedural safeguards imposed upon other agencies by the APA? Section 713(b) of the Act, 42 U.S.C. Sec. 2000e-12(b), certainly provides no such license.

In fact, pretrial discovery in *Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238 (N.D. Ga. 1973), revealed that "the 1972 [sex discrimination] guidelines were composed by one person (Mrs. Fuentes)[12] who had no expertise in the field of medicine, economics, or labor relations, and who was assisted in her work by only four other people, including two law students employed as law clerks.[13]

Mrs. Fuentes further testified that EEOC conducted no medical or financial studies on the basis of which it predicated the maternity benefit guidelines contained in Section 1604.10(b).[14] No public notice or public participation occurred even though EEOC intended to reverse, with the adoption of Section 1604.10(b), the prior written interpretations of its General Counsel, the Commission's concurrence therein reflected in its own report to Congress,[15] and the silence with respect to maternity benefits of the Guidelines prior to April 5, 1972.[16]

Judge Henderson quite correctly observed in refusing to defer to Guidelines, Section 1604.10(b), that "there appears to be no factual basis upon which these regulations were drawn." *Newmon v. Delta Air Lines, Inc.*, 374 F.Supp. 238, 245 (N.D. Ga. 1973).

---

[12] Mrs. Sonia P. Fuentes, then Chief of the Legislative Counsel Division of the EEOC, who testified on deposition taken May 31, 1973, that she was responsible for drafting the Sex Discrimination Guidelines. Amicus Curiae Brief filed by Delta Air Lines, Inc. in *Cohen v. Chesterfield County Board of Education* and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), pp. 25-26.

[13] *Id.* at 25.

[14] *Id.* at 25 and Appendix F thereto, pp. A-46 and 47.

[15] *See* footnote 19 and accompanying text, *infra*.

[16] The EEOC originally issued its "Sex Discrimination Guidelines" on November 22, 1965, (30 F.R. 14926) reaffirmed them on February 21, 1968 (33 F.R. 3344), amended them on August 19, 1969 (34 F.R. 13367) and last amended and reissued them March 30, 1972, effective April 5, 1972 (37 F.R. 6835). 1 CCH Emp. Prac. Guide Para. 3950.

Unrestricted administrative agency "legislation," such as occurred with the EEOC's April 5, 1972, promulgation of its new "Sex Guidelines," without compliance with APA rulemaking safeguards is far more disconcerting to the Nation's employers than the "adjudicatory" vs. "rulemaking" controversy which has long raged with respect to what type of "hearing" the NLRB should employ to change its substantive interpretations of the law. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

The lack of statutory authority for EEOC to promulgate *substantive* regulations and the agency's failure to comply with the procedural safeguards of the APA in issuing the April 5, 1972, "Sex Discrimination Guidelines" warrant this Court refusing to defer to Guidelines, Section 1604.10(b).

B. Guidelines, Section 1604.10(b) was not adopted contemporaneously with enactment of the Act's sex discrimination prohibitions and is not consistent with prior agency interpretations of the Act with respect thereto.

This Court has held that a *contemporaneous* and *consistent* construction of a statute by the administrative agency charged with its enforcement is entitled to great deference by the Federal courts. *NLRB v. Boeing Co.*, 412 U.S. 67, 75 (1973). But, "[w]hile acknowledging deference is due, blind adherence is not." *Espinoza v. Farah Mfg. Co.*, 462 F.2d 1331, 1334 (5th Cir. 1972), aff'd 414 U.S. 811 (1973).[17]

---

[17] Each of the circuit court decisions rendered to date, Owens-Illinois and Sherwin-Williams submit, failed to follow this admonition. In addition to the Third Circuit's decision presently before this Court (511 F.2d 199 (1975)), two other circuit courts have followed the reasoning of the maternity benefit Guidelines. *Communications Workers of America v. American Telephone and Telegraph Co.*, ___ F.2d ___, 9 EPD Para. 10,035 (2d Cir. 1975), rev'g and rem'g 379 F.Supp. 679 (S.D. N.Y. 1974); *Gilbert v. General Electric Co.*, ___ F.2d ___, 44 U.S.L.W. 2013 (4th Cir. June 27, 1975) (No. 74-1557).

Guidelines, Section 1604.10 was not adopted contemporaneously with the Act and is not consistent with prior agency interpretations of the Act.

The Act's Section 703 sex discrimination prohibitions, 42 U.S.C. Sec. 2000e-2, became law on July 2, 1964, and were effective one year later on July 2, 1965. Section 716(a) of the Act, 42 U.S.C. Sec. 2000e-15(a). Section 1604.10 of the Guidelines was published in the *Federal Register* and became effective on April 5, 1972, almost eight years after enactment and seven years after the effective date of the anti-discrimination provisions of the Act.

The earlier "Sex Discrimination Guidelines" expressed no view as to how disabilities caused by pregnancy and childbirth would be treated by EEOC.[18] Between 1966 and 1971, every public pronouncement by EEOC rejected the interpretation of the Act now set forth in Guidelines, Section 1604.10(b).

In a letter released November 10, 1966, EEOC General Counsel Charles Duncan declared: "[A]n insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory." Between December 21, 1966, and May, 1971, CCH Employment Practices Guide continued to report the contents of an opinion letter issued by Mr. Duncan on October 17, 1966, and released by EEOC on December 9, 1966, which read:

> You have requested our opinion whether the above exclusion of pregnancy and childbirth as a disability under the long-term salary continuation plan would be in violation of Title VII of the Civil Rights Act of 1964.

[18] *See* footnote 16, *supra*.

> In a recent opinion letter regarding pregnancy, we have stated, "The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees." Therefore, it is our opinion that according to the facts stated above, a company's group insurance program which covers hospital and medical expenses for the delivery of employees' children, but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth would not be in violation of Title VII.

In another letter dated November 15, 1966, Mr. Duncan wrote: "we do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness."

The foregoing EEOC policy was also reflected in the agency's First Annual Report[19] which stated at page 40:

> The prohibition against sex discrimination is especially difficult to apply with respect to the female employee who becomes pregnant. In all other questions involving sex discrimination, the underlying principle is the essential equality of treatment for male and female employees. The pregnant female, however, has no analogous male counterpart and pregnancy necessarily must be treated uniquely. . . .

Mr. Duncan, in testimony at trial in *Gilbert v. General Electric Co.*, 375 F.Supp. 367 (E.D. Va. 1974), aff'd 44 U.S.L.W. 2013 (4th Cir. June 27, 1975) (No. 74-1557), reaffirmed in detail the EEOC's reasoning underlying the foregoing interpretation of the Act.[20]

[19] This report covered the fiscal year ending June 30, 1966, and was sent to Congress on March 1, 1967. 42 U.S.C. Sec. 2000e-4(e).

[20] Brief for General Electric Company to the United States Court of Appeals for the Fourth Circuit in *Gilbert v. General Electric Co.*, No. 74-1557, pp. 24-25.

Until April 5, 1972, the official "interpretations" of the Act as reflected in EEOC General Counsel's opinion letters and in the silence of the Guidelines prior thereto *consistently sanctioned*, rather than condemned, differentiation in the provision of benefits for maternity and non-occupational illness and injury disabilities.[21]

In *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), this Court observed:

> The weight of such a judgment [i.e., an administrative agency interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give it power to persuade, if lacking power to control.

Where agency interpretations are neither contemporaneously adopted with the enactment of a law, nor consistent with prior interpretations, they are not entitled to judicial deferral. The non-deferral principle was succinctly articulated in *FTC v. Jantzen, Inc.*, 356 F.2d 253, 254 n. 4 (9th Cir. 1966), rev'd on other grounds, 386 U.S. 228 (1967):

> . . . [W]e owe little, if any, deference to the Commission's views as to what the statute does. A consistent interpretation of a statute by the body created to administer it is indeed entitled to judicial respect.

[21] On March 19, 1971, EEOC Decision No. 71-1474, CCH Decisions Para. 6221, was released, reflecting that there existed "reasonable cause to believe" that denial of salary continuation benefits where such benefits were granted for *all* other non-occupational disabilities, without reference to prior inconsistent interpretation of the Act in the opinions of General Counsel and the EEOC's reports to Congress. This decision was in conflict with a prior one released on December 16, 1969, EEOC Decision No. 70-360, CCH EEOC Decisions Para. 6084, which cited with approval the General Counsel's November 15, 1966, opinion letter hereinbefore quoted. Owens-Illinois and Sherwin-Williams submit that this one 1971 EEOC decision could not be interpreted as repudiating five years' of official interpretation of the Act otherwise. *Cf. Smith v. Universal Services, Inc.*, 4 EPD Para. 7617 (5th Cir. 1972).

> But it goes beyond all reason to apply the same rule to diametrically inconsistent positions taken by such a body. If we owe any deference to the Commission's views, it is to those that were contemporaneous with the enactment of the statute. . . .

Section 1604.10 of the "Sex Discrimination Guidelines" simply does not meet this Court's "consistent and contemporaneous construction" standard, *NLRB v. Boeing Co.*, 412 U.S. 67, 75 (1973) and, therefore, warrants no deferral.

C. Neither the Act nor its 1964 and 1972 Legislative History support deferral to Guidelines, Section 1604.10(b).

Where an Act and its legislative history support an EEOC interpretation, good reason may exist for treating a corresponding agency "guideline" as expressing the will of Congress. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971). On the other hand, this Court has more recently refused to defer to an EEOC Guideline where there existed "compelling indications that it is wrong." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973), citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969).

When the bill that ultimately became the Act was reported out of the Rules Committee of the House of Representatives on January 30, 1964 – one day before its passage – "sex" discrimination was nowhere therein proscribed; rather, the word "sex" was inserted by Congressman Smith as a last minute amendment during floor debate. 110 Cong. Rec. 2577 (1964). *See Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971), cert. denied 404 U.S. 950 (1971).[22]

[22] Because every male Congressman who supported the "sex" amendment voted against passage of the Act, 110 Cong. Rec. 2577-84, 2804 (1964), it has been surmised that the actual purpose of the amendment was to help defeat the Act's passage. *See, e.g., Rosen v. Public Service Electric & Gas Co.,*

Congressman Cellar, floor manager for the administration, argued against the Smith amendment and urged Congress to "wait until mature studies have been made before passing anti-discrimination laws applying to sex." 110 Cong. Rec. 2578 (1964). The *only* expression of Congressional purpose underlying the "sex" amendment appears to be that it was designed to prohibit denial of employment itself in certain occupations to one sex or the other solely because of sex. 110 Cong. Rec. 2577-2584 (1964). Congresswoman Green warned prophetically: "[F]ull and careful consideration was not given to the amendment . . . , there were no hearings by any Committee of the House; not a single word of testimony was taken; and the full implications could not have been understood." 110 Cong. Rec. 2720 (1964).

Similarly, there is nothing in the legislative history of the 1972 amendments to the Act, which involved changes, largely procedural rather than substantive in nature,[23] to support EEOC's switch in interpretation with respect to maternity benefit obligations, while there are several indications in that legislative history which support the view that Congress was neither asked to review the concept of whether maternity benefits should be brought within the ambit of the Act's *substantive* "sex" discrimination prohibitions, nor was Congress aware that EEOC intended to change its Guidelines or interpretations with respect thereto.

---

328 F.Supp. 454, 463 n. 4 (D.N.J. 1971). Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1167 (1971).

[23] The principal concern of Congress was whether EEOC should be granted NLRB-style "cease-and-desist" authority with judicial review confined to the "substantial evidence" standard established in this Court's decision in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), or whether it should be authorized enforcement powers only through direct access to the Federal trial courts. *See* 2 U.S. Code Cong. & Admin. News 2137 (1972); and Hearings before Senate and House Subcommittees, *infra.*, footnote 24. *See generally*, Pope & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L. Rev. 824 (1972).

EEOC Chairman William H. Brown, III, testified *without mentioning* the subject of maternity benefits or indicating that any changes were forthcoming to the agency's 1969 Sex Discrimination Guidelines then in force, in each of the hearings before the House and Senate Labor subcommittees considering amendment of the Act.[24] A review of the entire legislative history of the 1972 amendments to the Act reflects, with respect to remarks concerning "sex" discrimination only:

(1) A solitary reference to denial of maternity benefits to teachers[25]; and

(2) Several references to unequal employment *opportunities* for women, *viz.*, "[s]urveys indicate that women are deliberately placed in less challenging, less responsible, and less remunerative positions on the basis of sex alone."[26]

From the foregoing review of legislative history, Congress can only be assumed to have believed that the Sex Discrimination Guidelines, as amended August 19, 1969, 34 F.R.

---

[24] *See* Hearings on S.2453 before Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 91st Cong., 1st Sess. 38 (1969); Hearings on H.R. 6228 and 13517 before the House General Subcommittee on Labor of the Committee on Education and Labor, 91st Cong., 1st and 2d Sess. 32 (1969-1970); Hearings on H.R. 1746 before the House General Subcommittee on Labor of the Committee on Education and Labor, 92d Cong., 1st Sess. 79 (1971); Hearings on S.2515, S.2617 and H.R. 1746 before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 1st Sess. 48 (1971).

[25] May 7, 1971, letter authored by Ms. Mary Jean Collins-Robson, President, Chicago Chapter of the National Organization for Women, Hearings on S.2515, S.2617, and H.R. 1746 before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 1st Sess. 434 (1971).

[26] Statement of Mrs. Lucille H. Shriver, Director, National Federation of Business and Professional Women's Clubs, Inc., on October 6, 1971, during Hearings on S.2515, S.2617, and H.R. 1746 before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 1st Sess. 272 (1971); H. Rpt. No. 92-238 on H.R. 1746, 92d Cong., 1st Sess. 3-5 (1971); *see also* 117 Cong. Rec. 31960, 31975 (1971); 118 Cong. Rec. 295, 1383, 3383 (1972).

13367, remained the official EEOC interpretation because those Sex Discrimination Guidelines were the ones inserted, together with EEOC's "Guidelines" on each prohibited type of discrimination, into the record during floor debate on a proposed amendment to define substantively the term "religion" as it is used in the Act. 118 Cong. Rec. 705, 723 (1972). The combination of this insertion into the record of the 1969 "Guidelines" in their entirety and EEOC Chairman Brown's silence on any intent to amend or issue additional "Guidelines" can only be construed to mean that Congress was as wholly unaware as the Nation's employers that the EEOC was about to promulgate new "maternity benefit" Guidelines contained in 29 C.F.R. 1604.10(b).

In fact, the April 5, 1972, "Sex Discrimination Guidelines," including Section 1604.10, were not released until six days *after* enactment of the 1972 amendments and were not published in the *Federal Register* and made effective until 12 days after enactment.

On the other hand, the legislative history of the 1972 amendments to the Act illustrates two instances where Congress did expressly consider particular EEOC "Guidelines" and indicated Congressional support for the EEOC's interpretation of the Act in each of those instances:

(1) A floor amendment was offered to H.R. 1746 – though not enacted – which "alters the language of Title VII [Section 703(h) of the Act, 42 U.S.C. Sec. 2000e-2(h)] to better reflect the congressional intent [with respect to "job relatedness" of employment testing] as interpreted by the Court in the Griggs case," 117 Cong. Rec. 31961 (1971); and

(2) A floor amendment was offered – and ultimately enacted as Section 701(j) of the Act, 42 U.S.C. Sec. 2000e-(j) – to define the term "religion" as used in the Act. 118 Cong. Rec. 705, *et seq*.

Floor debate shows that, in adopting Senator Randolph's "religion" amendment, Congress *expressly* endorsed the EEOC's "Religious Discrimination Guidelines" and *expressly* rejected the circuit court decision in *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided Supreme Court 402 U.S. 689 (1971).

Owens-Illinois and Sherwin-Williams submit that, in the absence of legislative history such as that expressly endorsing EEOC Guidelines on "testing" and "religion," there simply exists no basis upon which to conclude that Congress has ever intended to expand the ambit of the word "sex" in the original 1964 Act to require employer provision of the same disability benefits for pregnant women as are provided for nonpregnant persons who sustain nonoccupational illnesses or injuries.

Since the EEOC had adopted contemporaneously with enactment of the 1964 Act and had consistently thereafter followed an interpretation of the Act contrary to what the agency intended to promulgate after congressional enactment of the 1972 amendments, and since EEOC knew that its 1969 "Sex Discrimination Guidelines" which were silent as to maternity benefits were considered by Congress, EEOC – and those who wish to rely thereon – simply cannot claim Congressional approval of the new maternity benefit guidelines contained in Section 1604.10(b). Had EEOC and the proponents of reversal of the agency's "contemporaneous and consistent" interpretation that exclusion of pregnancy from disability benefits was not "sex" discrimination really wanted Congressional approval of Section 1604.10(b), those new "Guidelines" should have been submitted to Congress in a form permitting statutory redefinition of the term "sex" such as occurred with enactment of Section 701(j), 42 U.S.C. Sec. 2000e-(j), defining "religion" under the Act. U. S. Constitution, Article I, Section 1 and Section 8, Clause 18.

After consideration of EEOC's "contemporaneous and consistent" interpretation of the Act as sanctioning exclusion of pregnancy from non-occupational disability plan coverage and upon realizing that Congress – like the Nation's employers – was kept in the dark until after enactment of the 1972 amendments that EEOC intended to issue Guidelines, Section 1604.10(b), reversing its 1966-1971 interpretation of the Act, Owens-Illinois and Sherwin-Williams believe that there exist "compelling indications that it is wrong" to defer to Guidelines, Section 1604.10(b). *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); and *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973).

In *Willingham v. Macon Telegraph Publishing Co.*, ___ F. 2d ___, 9 EPD Para. 9957 at 7014 (1975) (*en banc*), the Fifth Circuit Court of Appeals rejected the theory that male hair style preferences were protected by the Act's "sex" discrimination prohibition on the same rationale Owens-Illinois and Sherwin-Williams believe this Court should apply to the maternity benefits issue and Section 1604.10(b):

> We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate.
>
> We perceive the intent of Congress to have been the guarantee of equal job opportunity for males and females. Providing such opportunity is where the emphasis rightly lies.

Mr. Justice Harlan's dissent in *Arizona v. California*, 373 U.S. 546, 626 (1963), has particular application to EEOC's Guidelines, Section 1604.10(b):

> The delegation of such unrestrained authority to an executive official raises, to say the least, the gravest constitutional doubts. The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution. . . . First, it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. Second, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.

Congress, not the EEOC, should "legislate" so radical a revision of social policy and insurance industry practice as Guidelines, Section 1604.10(b) would require.[27]

---

[27] Professor Kenneth Culp Davis has noted in discussing Congressional "delegation of power":

> The legislative process is especially qualified and the administrative process is especially unfit for the determination of major policies that depend more upon emotional bent and political instincts than upon investigation, hearing, and analysis.

Administrative Law-Casebook 42 (1965 ed.). Of course, in promulgating Guidelines, Section 1604.10, EEOC made no investigation, held no hearing, and attempted no analysis of the implications of its maternity benefit guidelines, reenforcing the agency's particular unfitness to determine the major social policy changes it did on April 5, 1972.

CONCLUSION

For the foregoing reasons, Amici Curiae urge that this Court reverse the decision of the United States Court of Appeals for the Third Circuit, declaring that differentiation in the provision of benefits between "pregnant women and nonpregnant persons" does not violate the Act and refusing to defer to Guidelines, Section 1604.10(b), to the contrary.

Respectfully submitted,

LLOYD SUTTER
Attorney for Amici Curiae

Of Counsel:

O'CALLAGHAN, SAUNDERS, SUTTER & STUMM
A Professional Association
Suite 360, Prado North
5600 Roswell Road
Atlanta, Georgia 30342
(404) 252-2400

PROOF OF SERVICE

I hereby certify that, in accordance with Rule 33(1) of this Court's Rules, I have served three copies of this Amici Curiae Brief of Owens-Illinois, Inc. and The Sherwin-Williams Company on each party separately represented in this matter by depositing the same in a United States post office, first-class air mail, postage prepaid, addressed to the below-listed counsel of record:

For the Petitioner:

Kalvin M. Grove
Lederer, Fox & Grove
Suite 7916 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

For the Respondent:

Howard A. Specter
Litman, Litman, Harris & Specter, P. A.
Grant Building
Pittsburgh, Pennsylvania 15219

This 28th day of July, 1975.

/s/ LLOYD SUTTER

LLOYD SUTTER

Supreme Court, U. S.
FILED
JUL 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Appellant,

v.

SANDRA WETZEL, AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Appellees.

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF APPELLANT

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

By RICHARD D. GODOWN
General Counsel

LESLIE CARTER SILVER
Assistant General Counsel

1776 F. Street, N.W.
Washington, D.C. 20006

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

INTEREST OF THE *Amicus Curiae* 1

SUMMARY OF ARGUMENT 2

THE ARGUMENT

I. The Phrase "Sex Discrimination" as Used in Title VII of the Civil Rights Act of 1964 Can Have Only One Meaning: The Meaning That Is Compelled by the Constitution as Formulated in *Geduldig* v. *Aiello* 3

II. Since the Coverage Exclusions in the Plan in *Aiello* and Appellant's Plan Are Identical, Appellant's Plan Must Be Found To Be Not Discriminatory 7

III. The EEOC Guideline Is Not Entitled to Judicial Deference 9

CONCLUSION 12

AUTHORITIES CITED

CASES:

Argosy Limited v. *Hennigan*, 404 F.2d 14 (5th Cir. 1968) 10

Bolling v. *Sharpe*, 347 U.S. 497 (1954) 7

Brown v. *Board of Education*, 347 U.S. 483 (1954) 7

Carter v. *Panama Canal Company*, 463 F.2d 1289 (D.C. Cir. 1972) 10

Civil Service Commission v. *National Association of Letter Carriers*, 413 U.S. 548 (1973) 4

Cohen v. *Chesterfield County School Board*, 474 F.2d 395 (4th Cir. 1973) 6

Espinoza v. *Farah Mfg. Co.*, 414 U.S. 86 (1973) 3, 9, 12

Gandolfo v. *Hartman*, 4 F.181 (C.C.S.D. Cal. 1892) ... 7

Geduldig v. *Aiello*, 417 U.S. 484 (1974) .. 2, 3, 4, 5, 6, 7, 8, 11

Gilbert v. *General Electric Company*, 375 F. Supp. 367 (E.D. Va. 1974) 6

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 3, 9, 10

Hurd v. *Hodge*, 334 U.S. 24 (1948) 7

Massachusetts Trustees of Eastern Gas & Fuel Associates v. *U.S.*, 377 U.S. 235 (1964) 12

Page

Miller v. *California*, 413 U.S. 15 (1973) 5
N.L.R.B. v. *Brown*, 380 U.S. 278 (1965) 3, 9
Rafford v. *Randle Eastern Ambulance Serv., Inc.*, 348 F. Supp. 316 (S.D. Fla. 1972) 6
Scott v. *Opelika City Schools*, 63 FRD 144, (M.D. Ala. 1974) 6
State ex. rel. Chobot v. *Circuit Court for Milwaukee County*, 61 Wisc. 2d 354, 212 N.W. 2d 690 (1973) 5
U.S. v. *Chesterfield County School Dist., S.C.*, 484 F.2d 70 (4th Cir. 1973) 5, 6
Wetzel v. *Liberty Mutual Insurance Company*, 511 F.2d 199 (3rd Cir. 1975) 4
Willingham v. *Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (*en banc*) 9

CONSTITUTION, STATUTES, and REGULATIONS:

U.S. Constitution:

Fourteenth Amendment 2, 4, 5, 6, 7

42 U.S.C. § 2000e et seq. 2, 3, 4, 5, 6, 9, 10, 11, 12
West's Ann. Un. Ins. Code §§ 3251-3254 8
29 CFR § 1604.10 ..... 3, 9, 11, 12

SECONDARY MATERIALS:

Comment, *Geduldig* v. *Aiello*: *Pregnancy Classifications & the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441 (1975). 5

109 Cong. Rec. 11,174 (1963) 10

110 Cong. Rec. 2485 (1964) 9

H.R. Rep. No. 88-914, 88th Cong., 2d Sess. (1963) 2, 3

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971) 11

Note, *Developments in The Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971) 10

Opinion Letter of EEOC General Counsel, CCH Empl. Prac. Guide, ¶ 17, 304.43 (December 21, 1966) 11

I Statutory History of the United States (Chelsea House Publishers, 1970) 10

Sutherland on Statutory Construction 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Appellant,

v.

SANDRA WETZEL, AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Appellees.

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF APPELLANT

With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as *amicus curiae* in support of the Appellant.

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers ("NAM") is a non-profit voluntary business association, organized as a membership corporation under the laws of the State of New York. Its members comprise

manufacturing and related concerns of all sizes located throughout the United States. NAM, therefore, represents a substantial number of the nation's industrial employers. Many of its members have income protection plans and, therefore, may be directly affected by the Court's decision in this case.

Additionally, if the decision below is affirmed, labor-management relations will be affected. Since numerous NAM members have collective bargaining agreements providing for payment of health and disability benefits, members may choose not to offer any such benefits rather than comply with the decision of the court below. Fundamental labor-management relations and policies will, therefore, be affected by this Court's decision.

Accordingly, the NAM has a proper interest in the resolution of the issues before the Court in this case.

SUMMARY OF ARGUMENT

The Civil Rights Act of 1964 was enacted to implement and secure certain rights guaranteed by the Constitution. H. R. Rep. No. 88-914, 88th Cong., 2d Sess. (1963). The phrase "sex discrimination", as used in but undefined by the Act, can have only one meaning: the meaning that is compelled by the Constitution. This Court has already determined the constitutional definition in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). The "sex discrimination" prohibited by the Act must be the same as the "sex discrimination" prohibited by the equal protection clause. Since *Aiello* held that a plan identical to Appellant's in all material respects did not violate the equal protection clause, it follows that Appellant's income protection plan does not violate Title VII of the Act.

The EEOC Guideline relating to pregnancy, 29 CFR § 1604.10, is not entitled to the judicial deference normally accorded an administrative agency's action. *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). The legislative history concerning Title VII's sex discrimination provision and the social context which generated the 1964 Civil Rights Act clearly demonstrate that the Guideline is inconsistent with the intent of Congress. It, therefore, is to be accorded no judicial deference. *Espinoza* v. *Farah Mfg. Co.,* 414 U.S. 86, 94 (1973); *N.L.R.B.* v. *Brown,* 380 U.S. 278, 291 (1965).

Moreover, during the years 1966 through 1972, the EEOC maintained a policy that plans similar to Appellant's did not violate Title VII. Congress approved this policy by amending Title VII without altering that policy. Therefore, the EEOC Guideline, 29 CFR § 1604.10, is inconsistent with the intent of Congress.

THE ARGUMENT

I. The Phrase "Sex Discrimination" as Used in Title VII of the Civil Rights Act of 1964 Can Have Only One Meaning: The Meaning That Is Compelled by The Constitution as Formulated in Geduldig v. Aiello.

The Civil Rights Act of 1964 was enacted to implement and secure certain rights guaranteed by the Constitution.[1] H.R. Rep. No. 88-914, 88th Cong., 2nd Sess. (1963). The phrase "sex discrimination", as used in, and undefined by the Act, can have only one meaning: the meaning that is compelled by the Constitution.

---

[1] "A number of provisions of the Constitution of the United States clearly supply the means 'to secure these rights' ['considered the birthright of all citizens']" . . . and this Act "resting upon this authority is designed as a step toward eradicating significant areas of discrimination on a nationwide basis." H.R. Rep. No. 88-914, 88th Cong., 2d Sess. 18 (1963).

Therefore, the "sex discrimination" prohibited by the Act must be the same as the "sex discrimination" proscribed by the equal protection clause.

This Court has already formulated the constitutional meaning of "sex discrimination" in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). That case held that an income protection program which excludes pregnancy from its list of compensable disabilities does not involve "discrimination based upon gender as such;" it does not violate the Constitution. *Geduldig* v. *Aiello, supra,* at 496-97 n.20. Since the plan now being reviewed by this Court is similar in all material respects to the plan in *Aiello,* Appellant's plan clearly does not violate Title VII of the Act.

The court below incorrectly concluded that *Aiello* is not dispositive of the issue now before this Court, because, the court maintained, *Aiello* involved interpretation of the Constitution, not the statute and administrative guideline involved in this case. *Wetzel* v. *Liberty Mutual Insurance Company,* 511 F.2d 199, 203 (3rd Cir. 1975). But it would seem apparent, if not axiomatic, that decisions that interpret the Constitution provide "valuable aid in determining the *legitimate boundaries of statutory meaning.*" 2A *Sutherland on Statutory Construction* § 56.04 (Emphasis supplied). Title VII must be construed "so as to comport with constitutional limitations." *Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548, 571 (1973). These rules of statutory construction avoid a clearly absurd result; otherwise a statute implementing a provision of the Constitution could be interpreted to prohibit conduct which the courts had determined permissible under that very constitutional provision.

In *State ex. rel. Chobot* v. *Circuit Court for Milwaukee County,* 61 Wisc. 2d 354, 212 N.W. 2d 690 (1973), the court was required to construe the undefined term "obscenity" as it appears in the state's obscenity statute. The court supplied the definition formulated in the first amendment case, *Miller* v. *California,* 413 U.S. 15 (1973).

> [When] words which carry constitutional implications . . . [are] used without an express definition in the statute, the legislature must intend the courts to furnish its [*sic*] meaning from time to time as the constitutional concept of [the] words var[y].

Chobot v. *Circuit Court for Milwaukee County, supra,* at 696.

This court definitively stated in *Aiello* that an insurance plan's exclusion of pregnancy-related disabilities from compensable disabilities is not discriminatory on the basis of sex and, therefore, does not violate the Constitution. That holding supplies the constitutional definition of "sex discrimination". This Court must apply the constitutional definition of "sex discrimination" to that term's usage in Title VII; the constitutional definition is the statutory definition.

The case law demonstrates that there is only one definition of "sex discrimination". Opinions deciding Title VII cases freely adopt the definition of "sex discrimination" developed in the line of cases decided on equal protection clause grounds. Comment, *Geduldig* v. *Aiello*: *Pregnancy Classifications and the Definition of Sex Discrimination,* 75 COLUM. L. REV. 441, 467 (1975). In *U.S.* v. *Chesterfield County School Dist., S.C.,* 484 F.2d 70 (4th Cir. 1973), the court held that "the test of validity [of the employer's allegedly sexual-

ly discriminatory employment practices] under Title VII is not different from the test of validity under the fourteenth amendment." *Id.* at 73. (Citations omitted). The same logic is evident in *Rafford* v. *Randle Eastern Ambulance Serv., Inc.,* 348 F. Supp. 316 (S.D. Fla. 1972), which held an employer's dismissals of employees for violation of the company's no-beard rule did not violate Title VII because the dismissals would not violate the Constitution. See also, *Cohen* v. *Chesterfield County School Board,* 474 F.2d 395 (4th Cir. 1973) (Winter, J. dissenting), *rev'd.* 414 U.S. 632 (1974); *Gilbert* v. *General Electric Company,* 375 F. Supp. 367 (E.D. Va. 1974), *aff'd* — F.2d — (4th Cir. 1975).

Similarly, the definition of "sex discrimination" developed in Title VII cases has been used in opinions deciding sex discrimination cases brought on constitutional grounds. In *Scott* v. *Opelika City Schools,* 63 FRD 144 (M.D. Ala. 1974), a teacher challenged the school board's policy of dismissing pregnant teachers. The District Court said, in pertinent part,

> [i]f this case were being litigated under Title VII, defendants' maternity leave treatment would be unable to stand . . . .[T]his [same] result is equally called for under [the Constitution].

Id., at 149.

By applying the constitutionally mandated definition of sex discrimination, as determined in *Aiello,* it follows clearly that Appellant's income protection plan would not violate the equal protection clause if that applied directly. It is equally clear for the reasons stated above that the sex discrimination prohibited in Title VII does not—and cannot—prohibit more than that prohibited by the Constitution. By this standard, Appellant's income protection plan, therefore, does not violate Title VII.

II. Since the Coverage Exclusions in the Plan in Aiello and Appellant's Plan Are Identical, Appellant's Plan Must Be Found To Be Not Discriminatory.

Appellant's income protection plan is no different from the plan that was subject to this Court's review in *Aiello.* Since the plans are the same, they must receive equal treament. Appellant must be permitted to maintain its plan's pregnancy exclusion, in order for this Court's rulings to remain consistent.

There is authority dating back to 1892 for the proposition that persons and institutions that behave alike should be treated alike. In *Gandolfo* v. *Hartman,* 49 F.181 (C.C.S.D. Cal. 1892), a racially restrictive covenant was held to be non-enforceable. Even though the equal protection clause was not applicable to the transaction (there was no state action), the court, in effect, applied an equal protection standard to the parties to the contract; "[a]ny result inhibited by the [C]onstitution can no more be accomplished by contract of individual citizens than by legislation." *Id.,* at 182.

Similarly, in *Bolling* v. *Sharpe,* 347 U.S. 497 (1954), the Court found the District of Columbia operating a segregated public school system like that found in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), to have violated the equal protection clause. The Court refused to allow the D.C. system to continue even though the equal protection violation argument was inapplicable.

> [I]n view of our decision [in *Brown*] that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.

Bolling v. *Sharpe, supra,* at 500. See also, *Hurd* v. *Hodge,* 334 U.S. 24 (1948). With this principle in

mind, it is absurd to suggest that the State of California can validly maintain a pregnancy exclusion while Appellant cannot. Constitutionally permissible conduct in the case of a state cannot be statutorily prohibited conduct in the case of a private concern.

These cases, demonstrating that similar conduct is to be treated similarly, are applicable to this case. Although the court below attempted to distinguish *Aiello,* the two cases involve identical conduct. The issue is whether a particular aspect of the selective coverage of Appellant's plan is discriminatory. The material fact is the classification of pregnancy-related disabilities as non-compensable. This same issue was decided by *Aiello.* The court below never distinguished Appellant's plan and the plan in *Aiello* with respect to the fact that both excluded the same type of disability from coverage: pregnancy-related disabilities. Instead, it distinguished the cases by focusing on the fact that the plan in *Aiello* was supported totally by employee contributions and only normal pregnancy-related disabilities were excluded while Appellant's plan was supported only partially by employee contributions and excluded all pregnancy-related disabilities. The court below might have believed that since the employees alone contributed to the plan, those employees *voluntarily* submitted to a plan which did not cover all disability risks. Such a conclusion is incorrect; all employees not protected by an employer plan approved by the State must participate in the State plan. West's Ann. Un. Ins. Code §§ 3251-3254. Since some coverage for pregnancy-related disabilities is excluded under both plans, Appellant's plan should receive the same treatment as California's: it is not discriminatory.

III. The EEOC Guideline Is Not Entitled to Judicial Deference.

The EEOC Guideline relating to pregnancy, 29 CFR § 1604.10, is not entitled to the judicial deference normally accorded an administrative agency's action. *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). The legislative history concerning Title VII's "sex discrimination" provision and the social context which generated the 1964 Civil Rights Act clearly demonstrate that the Guideline is inconsistent with the intent of Congress. It, therefore, is to be accorded no judicial deference. *Espinoza* v. *Farah Mfg. Co.,* 414 U.S. 86, 94 (1973); *N.L.R.B.* v. *Brown,* 380 U.S. 278, 291 (1965).

The opinion in a recent Title VII decision stated that the legislative history regarding sex discrimination permits the negative inference that "Congress in all probability did not intend for its proscriptions of sexual discrimination to have significant and sweeping implications." *Willingham* v. *Macon Telegraph Publishing Co.,* 507 F.2d 1084, 1090 (5th Cir. 1975) (*en banc*). During House debate on the 1964 legislation, consideration was given to the fact that the scope of the sex discrimination problem makes it an unsuitable topic for inclusion in the Act. Representative Emmanuel Celler read into the record a letter from the Secretary of Labor on that topic. The Secretary believed that the inclusion of sex discrimination would not be wise; the President's Commission on the Status of Women had previously concluded that "discrimination based on sex . . . involves problems sufficiently different from discrimination based on . . . other factors . . . to make separate treatment preferable." 110 Cong. Rec. 2485 (1964).

The Secretary's recommendation was rejected; sex discrimination is proscribed by the Act. This Court

is required to decide what type of employer behavior is an act of sex discrimination and, therefore, intended by Congress to be proscribed. This Court must consider the political, economic, and social context in which Title VII was passed, as well as its textual content. *Argosy Limited* v. *Hennigan,* 404 F.2d 14 (5th Cir. 1968). A particular portion of a statute must be construed "in conformity with its [the statute as a whole] dominating general purpose. . . ." *Carter* v. *Panama Canal Company,* 463 F.2d 1289, 1300 (D.C. Cir. 1972).

The Civil Rights Act of 1964 was written during a period of intensifying racial frustration and unrest. It was the expression of the American conscience's attempt to rectify decades of unconscionable treatment of blacks.[2] "The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs* v. *Duke Power Co., supra,* at 429-30. The Act outlawed employment practices which express an employer's stereotypical beliefs concerning blacks. The employer could no longer prefer to recruit, hire, fire, place, or promote an employee solely because of the employee's race.

The phrase "sex discrimination" must be interpreted in conformity with this general non-preferential legislative intent. Congress intended the Act, as enforced in part by the EEOC, to prohibit employers from "keeping the woman in her place." The male employee could no longer be preferred by an employer in the hiring and promotion process. H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 4 (1971). Title VII focuses on preferential employment practices: "discrimination based upon gender, [race, religion, and national origin] as such." *Geduldig* v. *Aiello, supra,* at 496-97 n. 20.

That type of employer action is not present in this case. "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Geduldig* v. *Aiello, supra,* at 496-97. The purpose of the Act is to equalize opportunity, not establish advantages for either men, women, blacks, or whites. If the decision below is affirmed, an advantage not contemplated by Congress would be created; pregnant women would be improperly afforded preferential treatment.

Moreover, at the time Congress amended Title VII, the EEOC maintained a long standing policy that income protection plans like Appellant's, which excluded pregnancy as a disability, did not violate Title VII. CCH Empl. Prac. Guide ¶17,304.43 (December 21, 1966). Neither the debate on nor the substance of the 1972 Amendments indicates congressional disapproval of this policy. The EEOC Guideline, adopted in 1972 *after passage of the Title VII amendments,* clearly is contrary to the will of Congress.[3]

---

[2] I Statutory History of the United States (Chelsea House Publishers, 1970); President Kennedy stated that the Act was needed to meet "a rising tide of discontent that threatens the public safety." 109 Cong. Rec. 11,174 (1963); a major motive behind the passage of Title VII was "a desire to enhance the relative social and economic position of the American black community." Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109, 1113 (1971).

[3] The court below is incorrect in its conclusion as to what EEOC administrative policy Congress approved. The opinion implies that Congress approved the Guideline policy when it enacted the 1972 Amendments. This is actually impossible since the Guideline was published in final form, 37 Fed. Reg. 6835 (1972), *after* the amendments became law.

The 1966 EEOC policy interpreted one aspect of "sex discrimination." Congress considered it to be an accurate representation of its intent concerning sex discrimination. This approval is evident in Congress's silence on the matter during consideration of the 1972 Amendments. *Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *U.S.*, 377 U.S. 235 (1964).

The EEOC totally reversed its policy concerning pregnancy exclusions in income protection plans after the Congress approved its prior policy. 29 CFR § 1604.10. This change clearly was neither anticipated nor found necessary by Congress. It is not premised upon any congressional intent; the Guideline is not entitled to judicial deference. *Espinoza* v. *Farah Mfg. Co., supra.*

CONCLUSION

It is respectfully submitted that the phrase "discriminate . . . because of . . . sex," as it is used in Title VII of the Civil Rights Act of 1964, must have the same meaning as the constitutional meaning of the phrase. Since Appellant's income protection plan does not violate the Constitution, it does not violate Title VII. The decision of the court below must be reversed.

Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

By RICHARD D. GODOWN
General Counsel

LESLIE CARTER SILVER
Assistant General Counsel

1776 F Street, N.W.
Washington, D.C. 20006

July, 1975

see

74

1589